

BEFORE THE DEPARTMENT OF LICENSING
HEARINGS AND INTERVIEWS SECTION

NATHAN H. DeMARRE; SHIRL N. DeNAULT;)
JOSHUA A. DIME; ROBERT A. WOLZ; JOHN)
P. SHIELDS; JAMES A. YOUNG; DANIEL)
O'HALLORAN; EMILY K. ANDRES; MICHAEL)
D. WALLACE; SHERMAN M. BISSELL; JAMES)
R. ZEIGEN; MATT R. HANDRON; JEFF A.)
ALBRIGHT; STEPHEN M. SMITH; KIMBERLEE)
J. HUDSON; DAVID A. GUNDERSON; and)
STEPHANIE L. HANSON,)

Petitioner(s),)

vs.)

STATE OF WASHINGTON, DEPARTMENT)
OF LICENSING)

Respondent(s).)

TRANSCRIPT OF PROCEEDINGS BEFORE
HEARING OFFICER ANN L. LANGE

11:40 A.M.

SEPTEMBER 9, 2004

320 NORTH 85TH STREET

SEATTLE, WASHINGTON

REPORTED BY: MARY L. GREEN, CCR NO. 2981

A P P E A R A N C E S

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KATHY KOEHLER
MARY PAT CASEY
BRAD DAHLQUIST
CRAIG NELSON
ROBIN REICHERT
Rod GULLBERG
ELIZABETH GRAHAM (by telephone)
KATHLEEN JOUETT (by telephone)
LEONARD ENGLISH (by telephone)
JOHN MARTS
JAMES WALKER

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2. NIST Traceability Declaration	7	35
3. Simulator Solution Thermometer Annual Certification and NIST Traceability Declaration	7	35
4. Report of Test for Digital Thermometer	7	35
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1 SEATTLE, WASHINGTON; THURSDAY, SEPTEMBER 9, 2004

2 11:30 A.M.

3 --oOo--

4
5 HEARING OFFICER LANGE: This is a continuation of
6 several administrative hearings of record. It is now
7 September 9, 2004, and it is approximately 11:40 a.m. My
8 name is Ann Lange. I'm the hearing officer with the
9 Department of Licensing, State of Washington. Also present
10 are Hearing Officers Marjorie Gregg and Katherine Koehler and
11 Hearing Officers Mary Pat Casey, Brad Dahlquist, and Ellen
12 Barton.

13 Present on behalf of Petitioners Nathan DeMarre,
14 Shirl DeNault, Joshua Dime, Robert Wolz, and John Shields is
15 Mr. Vernon Smith, and also James Young. Present on behalf of
16 Daniel O'Halloran, Emily Andres is Mr. George Bianchi.
17 Present on behalf of Michael Wallace, Sherman Bissell, James
18 Zeigen, Matt Handron, Jeff Albright, and Stephen Smith is
19 Diego Vargas, and Drue Kirby is also present from that firm.
20 Not yet present but will be joining us will be Kevin Trombold
21 on behalf of Kimberlee Hudson, David Gunderson, and Stephanie
22 Hanson. Also present is James Walker on behalf of Tim
23 Bunaman.

24 Also present is the witness, Dr. Barry Logan, and
25 his counsel, Ms. Shannon Inglis. Present on behalf of the

1 department is -- I'm sorry -- Susan DanPullo and Masako
2 Kanazawa. Also observing is Mr. Craig Nelson, Robin
3 Reichert, Sergeant Gullberg.

4 We're here to take testimony from Dr. Barry Logan
5 regarding certain issues in connection with breath testing
6 for certain Department of Licensing hearings. Just so you
7 all know, this matter is not only being kept by a court
8 reporter. It's also being kept by audiotape.

9 At this time, I am going to turn it over to
10 Mr. Smith to begin questioning of Dr. Logan.

11 MR. SMITH: Thank you. Before I begin questioning,
12 can we identify for the record a number of the exhibits that
13 I'll be using for my part of the hearing? I've got the June
14 10 declaration, the July 13 declaration, the August 4
15 declaration, and the ICL Calibration Laboratory report on
16 instrument number 091800 with a date of January 22 of '04.
17 Can we get those numbered so we can --

18 HEARING OFFICER LANGE: Okay.

19 MR. SMITH: While that's being done, the record
20 should also reflect I also believe I'm representing a
21 Mr. Warwick.

22 HEARING OFFICER LANGE: I apologize. I didn't
23 include that. So 1 is which one?

24 MR. SMITH: The June 10 declaration. What number
25 do you want to give that?

1 HEARING OFFICER LANGE: That should be 1.

2 MR. SMITH: All right.

3 HEARING OFFICER LANGE: Okay. June 10 is number 1.

4 MR. SMITH: I assume then July 13 will be number 2?

5 HEARING OFFICER LANGE: July 13 will be number 2.

6 MR. SMITH: August 4 is Exhibit 3.

7 HEARING OFFICER LANGE: Here's the ICL document,
8 No. 4. Number 5 is the report of calibration from NIST for
9 serial 0159.

10 (DeMarre Exhibit Nos. 1 - 5 were marked for
11 identification.)

12 MR. SMITH: Let me also add onto the record that
13 based on the format for today's hearing so that each attorney
14 is not going to replot the exact same ground for each of
15 their clients that I'm reserving the right to use any part of
16 the record that's developed today by myself or any of the
17 other attorneys present today in my arguments later on on
18 behalf of my clients.

19 HEARING OFFICER LANGE: We won't be taking argument
20 today, but, yes, I understand that I would allow any attorney
21 to use any portion of the hearing.

22 MR. SMITH: Thank you. I'm ready to proceed.

23 HEARING OFFICER LANGE: As soon as we get our three
24 hearing officers. Is Mr. Trombold there too?

25 MS. BARTON: No.

1 HEARING OFFICER LANGE: You're all there?

2 MS. GRAHAM: Yes.

3 HEARING OFFICER LANGE: Ms. Jouett?

4 MS. JOUETT: Yes.

5 HEARING OFFICER LANGE: And Mr. English?

6 MR. ENGLISH: Yes.

7 HEARING OFFICER LANGE: Please proceed.

8

9 BARRY LOGAN

10 Sworn as a witness by the Notary Public,

11 Testified as follows:

12

13 EXAMINATION

14 BY MR. SMITH:

15 Q. Good morning, Dr. Logan.

16 A. Good morning.

17 Q. My name is Vern Smith. I represent several drivers
18 who are contesting the loss of their license at today's
19 hearing. I'm going to be asking you some questions
20 concerning some of the exhibits that have been submitted
21 today that have your signature on them under penalty of
22 perjury.

23 If at any time you do not understand any of my
24 questions, please inform me so that I can rephrase the
25 question. If at any time you feel the need to take a break,

1 please inform me, and if at any time you feel the need to
2 consult privately with your private counsel, please feel free
3 to inform me of that fact also. Do you have any questions?

4 A. Not at this time.

5 Q. Just for the record, what's your current position?

6 A. I am the state toxicologist for the State of
7 Washington. I'm the director of the Forensic Laboratory
8 Services Bureau of the Washington State Patrol.

9 Q. And how long have you been employed by the
10 Washington State Patrol?

11 A. Since July of 1999.

12 Q. Now, do you work out of one office typically?

13 A. I have one office that's my primary office, yes.

14 Q. Is that the one on Airport Way or is that --

15 A. Yes, it is.

16 Q. So you don't have an office, for example, at the
17 state patrol breath test section?

18 A. No, I do not.

19 Q. In preparation for today's testimony, have you
20 reviewed any documents?

21 A. Yes, I have.

22 Q. And what documents are those?

23 A. They were documents that were provided to me by
24 Mr. Vargas's firm and Mr. Bianchi's firm. There was about
25 over a thousand pages, and I wouldn't attempt to recall

1 everything that I reviewed.

2 Q. And I won't ask you to. So you have reviewed the
3 documents that were submitted --

4 A. To some extent. I received them only when I
5 returned from vacation on Tuesday of this week, so I've not
6 had a chance to review them in depth.

7 Q. Do you feel that you're now prepared to go forward
8 today based on your limited review of the documents?

9 A. If we get to issues that I feel for which that is
10 the case, I'll let you know.

11 Q. Thank you. And who have you met with in
12 preparation for today's testimony?

13 A. I met with Mr. Craig Nelson from the Department of
14 Licensing and my counsel, Ms. Inglis, earlier this week and
15 Sergeant Gullberg where we discussed some of the issues that
16 were raised in the motion that has been filed, and I met
17 briefly this morning with Ms. DanPullo and Ms. Kanazawa from
18 the Attorney General's office.

19 Q. Were any notes taken of any of these meetings?

20 A. Not by me.

21 Q. Any notes taken by anybody at these meetings?

22 A. Not that I recall.

23 Q. Were there any exchange of written material?

24 A. Other than the exhibits that I've been provided
25 with, I don't recall any other materials that I was provided

1 with in these meetings.

2 Q. And can you --

3 A. And I may have provided copies of those documents
4 to other people at the meeting.

5 Q. Approximately how many meetings were held?

6 A. One.

7 Q. In addition to that meeting, have you had any phone
8 discussions with anyone in preparation for today's testimony?

9 A. Nothing substantive other than scheduling.

10 Q. I take it that means scheduling with the Department
11 of Licensing hearing office?

12 A. Yes.

13 Q. Have you had any e-mail correspondence with anyone
14 in preparation for today's testimony?

15 A. The same applies, just scheduling.

16 Q. In addition to the meeting and phone conversations
17 and e-mails, have you had any other contact in person or
18 otherwise in preparation for today's testimony?

19 A. I think we've covered all the bases.

20 Q. And you have a copy of Exhibit 1 in front of you?

21 A. No. Are these mine?

22 HEARING OFFICER LANGE: Well, they're ours, but you
23 can look at them.

24 Q. (BY MR. SMITH) I believe Exhibit 1 is a declaration
25 that it appears that you executed on June 10 of this year.

1 A. Yes.

2 Q. Have you had an opportunity to review this document
3 prior to today?

4 A. Not specifically for the purpose of this hearing,
5 but I'm familiar with it.

6 Q. All right. And do you recall signing it on the
7 10th?

8 A. Yes.

9 Q. And did you sign that at your office?

10 A. Yes, I did.

11 Q. And do you know approximately when you signed it on
12 that day?

13 A. No, I don't.

14 Q. Did you draft this document yourself?

15 A. I don't believe so, no.

16 Q. Do you know who did draft this document?

17 A. I believe initially I was provided with this
18 language by Mr. Craig Nelson. That's my recollection.

19 Q. And Mr. Nelson's position with the Department of
20 Licensing if you know it?

21 A. I don't know. I don't recall specifically.

22 Q. And how did that come about? Did he contact you?
23 Did you contact him?

24 A. Oh, I believe he contacted me with reference to an
25 issue that had arisen during the Department of Licensing

1 hearings.

2 Q. And so when you say he drafted it, he sent you this
3 over for you to sign?

4 A. I quite honestly don't recall at this point whether
5 we discussed language on the phone or whether he sent me a
6 draft of that to review and consider.

7 Q. Once you received this proposed declaration from
8 the Department of Licensing, did you involve anyone else in
9 the finalization of this document?

10 A. No.

11 Q. So I take it that means you did not consult anyone
12 with the breath testing section or the Attorney General's
13 Office?

14 A. That's my recollection.

15 Q. And what's your understanding as to why this
16 declaration was created?

17 A. That for purposes of Department of Licensing
18 hearings, the department required a document that reflected
19 the fact that the only thermometers that were in use were the
20 ones that were -- in the breath test program were the ones
21 that had been identified in the June 10 amendment to the
22 emergency amendment to the Washington Administrative Code.

23 Q. In the process of creating this exhibit, were there
24 any notes, memos, e-mails, or other written documents that
25 were created?

1 A. I don't recall. If Mr. Nelson had sent me
2 something by e-mail, I would still have that e-mail.

3 Q. Would you be willing after this hearing to look
4 through your saved e-mail to see if that e-mail still exists?

5 A. You bet.

6 Q. And would you be willing to provide that to me?

7 A. Sure.

8 Q. Thank you. If you can go to Exhibit 2, which
9 appears to be a declaration that you executed on July 13 of
10 this year. Did you have an opportunity to review that
11 document?

12 A. Yes, I have.

13 Q. And you recall signing that document on July 13?

14 A. Yes.

15 Q. All right. And did you sign that at your office on
16 Airport Way?

17 A. Yes.

18 Q. Did you draft this document yourself?

19 A. No.

20 Q. Who assisted you or who did draft this?

21 A. I received a draft of this from Mr. Nelson.

22 Q. Did he call you first and say we need to get
23 another declaration or did he e-mail you or what's your
24 recollection?

25 A. I don't recall. I expect he e-mailed me.

1 Q. Do you recall what he said the problem was as to
2 why this needed to be executed?

3 A. I believe that the Department of Licensing felt or
4 he felt that they needed to have some more specific
5 information in the form of a declaration with respect to the
6 NIST traceability of the reference -- digital reference
7 thermometers used by the state patrol.

8 Q. Now, when you say that Mr. Nelson created this
9 document originally or drafted a version of this document
10 originally, did he send this over to you? Did he e-mail this
11 to you?

12 A. He would have e-mailed this to me.

13 Q. In addition to that --

14 A. And I certainly and probably did make some
15 amendments to what he sent me.

16 Q. What did you amend?

17 A. I don't recall.

18 Q. Do you still have the original e-mails, do you
19 think?

20 A. I expect I do.

21 Q. Would you be willing to produce those e-mails?

22 A. Yes.

23 Q. Thank you. Are there any other notes or written
24 material in addition to the e-mail that are in your
25 possession or were created to your recollection relating to

1 the execution of this declaration?

2 A. No.

3 Q. Who did you consult with in finalizing this draft
4 besides Mr. Nelson?

5 A. Sergeant Rod Gullberg.

6 Q. And what was your purpose in having doctor --
7 Sergeant Gullberg involved?

8 A. It was with a view to checking the accuracy of the
9 dates that I indicated in the declaration.

10 Q. So when the declaration states as early as March 19
11 of 2003, what did you do to ascertain that that is a correct
12 statement?

13 A. I reviewed the documents maintained by each of the
14 breath test technicians with respect to the dates -- first
15 date at which they began to certify mercury-in-glass
16 thermometers against digital reference thermometers that had
17 been directly certified by ICL Laboratories in Florida, and
18 the last date which that had been done was December 12.

19 Q. So is it your testimony that you personally
20 verified through looking at the records every
21 mercury-in-glass thermometer fits the state schedule?

22 A. Yes. Mercury-in-glass thermometers used in breath
23 test instruments. All of these documents are posted on the
24 state patrol's web site, and that's where I reviewed those
25 documents.

1 Q. And it's your testimony you did that for every
2 single mercury-in-glass thermometer in a machine that's out
3 in the field?

4 A. Yes. Each technician produced a one-page report
5 listing the serial numbers of the mercury-in-glass
6 thermometers in use in their instruments in the field and the
7 dates on which those were certified against their digital
8 reference thermometer that had been certified against ICL's
9 and NIST traceable standard, and I reviewed each of those, so
10 it was an approximately 14- or 15-page document.

11 Q. When you say it's a 14- or 15-page document, you
12 mean you were presented a summary of all these thermometers
13 or did you look up the individual certification for each
14 thermometer?

15 A. What I reviewed was a document which contained a
16 report from each of the breath test technicians from the
17 breath test section of the Washington State Patrol listing --
18 each report lists all of the thermometers that that
19 technician had responsibility for and field Datamasters, and
20 it indicates the information that I just recanted that I
21 reviewed to sign this declaration.

22 Q. So that document you reviewed specified
23 thermometers by number or did it just say I've got X number
24 of thermometers in my department and they're all certified?

25 A. It identifies them by number, by serial number.

1 Q. And what is the approximate number of
2 mercury-in-glass thermometers that the state patrol had in
3 the field as of July 13?

4 A. I believe it's around 180.

5 MS. DANPULLO: I'm sorry. Can we have a
6 clarification as to what you --

7 MR. SMITH: July 13 of '04 declaration.

8 Q. (BY MR. SMITH) You said 180?

9 A. I believe it's around 170 or 180, yes.

10 Q. How many do they own as of today? Do you know?

11 A. It's approximately the same.

12 Q. Now, your declaration indicates that the
13 mercury-in-glass thermometers have been tested and certified
14 against the thermometers traceable to standards maintained by
15 NIST. I take it that's referring to the digital reference
16 thermometers that they're tested against?

17 A. Yes, it is.

18 Q. And what steps did you take to ensure that each of
19 the digital thermometers was in fact properly traceable to
20 NIST when you made this declaration?

21 A. I have reviewed the certificates provided to the
22 Washington State Patrol breath test section by ICL
23 Laboratories.

24 Q. And did you review that for each and every digital
25 reference thermometer before you signed this declaration?

1 A. No, I did not.

2 Q. Now, you indicate that the uncertainties were
3 measured and recorded at each level, and I take it you're
4 referring to the traceability standards to NIST. Would that
5 be a fair summary?

6 A. Yes. The language that I used in this declaration
7 was the language that was ultimately recognized by the court
8 in the definition of traceability in the case of Seattle
9 versus Clark-Munoz.

10 Q. Are you the one that added that language into the
11 declaration or --

12 A. I don't recall. I don't recall. I know I put the
13 language in there concerning the dates, but I don't recall
14 what else I put in there.

15 Q. And what did you do to personally verify that in
16 fact the uncertainties had been measured and recorded at each
17 level for each digital reference thermometer?

18 A. That statement is based on my familiarity with the
19 format of the reports issued by ICL and my reliance on the
20 indication on the documents produced by the breath testing
21 issues that had accurately reflected the fact that they had
22 received these documents from ICL.

23 Q. So if I understand your answer correctly, you did
24 not verify for each individual digital reference thermometer
25 that in fact there were uncertainties measured and recorded

1 at each level. Is that fair to say?

2 A. To the extent that I did not pull the original
3 certifications from ICL for each digital reference
4 thermometer, that would be fair to say. Over the last six
5 months, I probably reviewed most of them, but I couldn't give
6 you a list of the ones that I have reviewed. And that's just
7 from my involvement in hearings or litigation referencing
8 these thermometers.

9 Q. Why don't we turn to Exhibit 3, which appears to be
10 a declaration you executed on August 4 of this year. Do you
11 have that exhibit in front of you?

12 A. Yes.

13 Q. Have you had an opportunity to review that exhibit
14 before today?

15 A. Yes, I have.

16 Q. Do you recall signing it on the 4th?

17 A. Yes.

18 Q. And where did you execute this document?

19 A. In my office in Seattle.

20 Q. And, again, did you draft this document?

21 A. No.

22 Q. Who did draft it?

23 A. I was provided that by Mr. Craig Nelson.

24 Q. So based on your previous testimony, am I correct
25 in assuming that Mr. Nelson e-mailed you and said we need

1 another declaration?

2 A. Yes.

3 Q. And did he present this to you in substantially the
4 form it's in now?

5 A. Yes.

6 Q. What changes, if any, did you make to it?

7 A. Ultimately I don't believe I made any changes in
8 this version from what he sent me. I didn't.

9 Q. Were there any other -- in addition to the e-mail
10 -- do you still have that e-mail by the way?

11 A. I would have that. There were a series of e-mails.

12 Q. Would you be able to produce those e-mails for me?

13 A. Yes.

14 Q. Thank you. In addition to those e-mails, do you
15 have any other notes, memos, or other written documents
16 pertaining to the creation of Exhibit 3?

17 A. No.

18 Q. So I take it Mr. Nelson gave you this date by
19 December 12 of 2003 that's contained in the declaration?

20 A. Well, it's the same date that was in the prior
21 declaration. It's simply the March date, which Mr. Nelson
22 indicated to me the Department of Licensing felt was
23 confusing, and that is my understanding of the purpose for
24 the change that was made in this declaration.

25 Q. And what steps did you take to ensure that in fact

1 by December 12 of '03 the mercury-in-glass thermometers used
2 in all DataMaster instruments had been tested and certified
3 against thermometers traceable to NIST standards?

4 MS. DANPULLO: Objection; asked and answered.

5 HEARING OFFICER LANGE: Agreed.

6 MR. BIANCHI: We would object to the partaking of
7 this attorney. I don't know who this person is representing
8 or if the administrative code provision allowed for
9 representation by the Department of Licensing in these
10 hearings. The WACs and RCW only allows for representation
11 from individuals or petitioners.

12 HEARING OFFICER LANGE: The WACs and the statutes
13 do not forbid the participation of the representative of the
14 department, and that is what Ms. DanPullo is doing here this
15 morning, so your objection is overruled. The objection made
16 by Ms. DanPullo is sustained.

17 MR. SMITH: Well, let me address the ruling, because
18 my previous question dealt with the execution date of July
19 13. This is a new declaration executed on August 4, so we
20 are covering dates between July 13 to August 4. That has not
21 been answered in terms of that time span, so I would again
22 ask you to reconsider your ruling so that he can answer that
23 question.

24 HEARING OFFICER LANGE: Any response?

25 MS. DANPULLO: Yes, your Honor. The declaration

1 dates are exactly the same. The December 12 date of 2003,
2 that's the question that he asked how he determined that that
3 was the date, did he specifically look at anything, which is
4 the exact date in Exhibit No. 3, and for that reason it's
5 already been asked and answered.

6 MR. SMITH: I'll rephrase.

7 Q. (BY MR. SMITH) Dr. Logan, what steps, if any, did
8 you take between July 13 and August 4 to ascertain the
9 accuracy of your statement that by December 12 all the
10 mercury-in-glass thermometers had been tested and certified
11 against NIST traceable thermometers?

12 A. Nothing in addition to my prior statements.

13 Q. And would that also be true in terms of additional
14 steps you took in terms of verifying the uncertainties that
15 had been measured and recorded?

16 A. Yes.

17 Q. Thank you. The execution of the August 4 Exhibit
18 3, did you consult with anyone besides Mr. Nelson in the
19 creation of this exhibit?

20 A. I don't recall. I may have sent one or more of
21 these to my counsel for review.

22 Q. To your counsel for review?

23 A. Yes.

24 Q. And I'm sorry. That would be Ms. --

25 A. Ms. Inglis.

1 Q. So that means you did not have any contact with the
2 breath test section?

3 A. I did discuss this issue of the dates with Sergeant
4 Gullberg on a number of occasions. I was just concerned that
5 the statements I was making with respect to this date were
6 accurate, but that was it, just general discussions.

7 Q. Are there any notes or e-mails or any form of
8 written memoranda concerning your contacts with Sergeant
9 Gullberg?

10 A. No. My recollection is that it was a telephone
11 conversation or a personal conversation.

12 Q. If you can turn to Exhibit 4. Do you recognize
13 what that document is?

14 A. Yes.

15 Q. What's your understanding of what that document is?

16 A. This is a copy of a certificate that is provided to
17 the breath test section of the Washington State Patrol by ICL
18 Calibration Laboratories in Florida.

19 Q. Did you have an opportunity to review this document
20 before today?

21 A. I don't recall if I have reviewed this specific
22 one, but I have reviewed numerous similar documents over the
23 last two years.

24 Q. When you say similar documents, would you agree
25 that those documents basically reference one of the digital

1 reference thermometers in terms of testing that ICL Labs has
2 done on that --

3 A. Yes.

4 Q. Would you agree with me that -- or would you say
5 it's fair to say that this document was obtained for ICL --
6 from ICL Labs to assist the state patrol in getting breath
7 tests admitted in criminal trials in the Department of
8 Licensing hearings?

9 A. Yes.

10 Q. Now, this particular document, it appears that the
11 report on this digital reference thermometer is received by
12 the ICL Labs on January 21 of '04. Would you agree with me
13 on that?

14 A. That the report was issued on January --

15 Q. No. The digital reference thermometer, there's a
16 date received for calibration. It says 1-21 of '04?

17 A. Yes. I would agree with that.

18 Q. And it issues the report on January 22 of '04?

19 A. Yes.

20 Q. Do you have any reason to disagree with that
21 timetable?

22 A. No.

23 Q. Does the Washington State Patrol have a contract
24 with ICL Calibration Laboratories to perform services?

25 A. I don't know. I'm not aware of any formal contract

1 we have with them. We use them as a vendor for this service,
2 but I think we would be free to send them to any certified
3 laboratory.

4 Q. Well, when you say you send them to a vendor, do
5 you normally have a contract with your vendors to provide
6 services?

7 A. Not necessarily.

8 Q. Okay.

9 A. It would depend on the cost.

10 Q. Do you send these digital reference thermometers to
11 any other laboratory anywhere?

12 A. No.

13 Q. So you no longer use Bostec?

14 A. Correct.

15 Q. Who would know whether or not in fact there was a
16 contract for services between the State of Washington and ICL
17 Laboratories?

18 A. I expect Sergeant Gullberg would know the answer to
19 that.

20 Q. Do you know who selected ICL Calibration
21 Laboratories to perform services on your digital reference
22 thermometers?

23 A. Well, they were selected because they were
24 originally part of the chain that we had established when the
25 process for certification of thermometers was set up about

1 three years ago, which at that time did involve both Bostec
2 and Guth.

3 Guth Laboratories used ICL. They were a reputable
4 laboratory. They had a good reputation. They were
5 recognized as a credible organization, in fact, by some of
6 the experts retained by the defense in the prior litigation
7 on thermometry, and so they were selected for that purpose
8 because of their familiarity with that Guth digital
9 thermometer and the fact they had been involved in the
10 process before.

11 Q. So if I understand you correctly, are you saying
12 that either Guth or Bostec referred you or the state patrol
13 or somebody within the state to ICL Laboratories?

14 A. No. I don't think that's accurate. We were aware
15 of ICL Laboratories because of their involvement in the prior
16 process, but we had had some direct communication with ICL
17 during the prior litigation on thermometers in order to
18 better understand what was involved with their process, and
19 they were a cooperative and reputable laboratory.

20 Q. In the execution of your declarations that we've
21 covered in Exhibits 1, 2, and 3, would it be fair to say that
22 you rely on reports from ICL Laboratories on your digital
23 reference thermometers to make your declarations?

24 A. Yes.

25 Q. Would it be fair to say that these reports from ICL

1 Laboratories forms the basis for your opinion that the state
2 patrol's digital reference thermometers are properly
3 traceable to NIST standards?

4 A. Yes.

5 Q. What is your understanding as to the steps involved
6 in performing the digital reference thermometer
7 certification?

8 A. The digital reference thermometer is checked
9 against three transfer standards, which are themselves
10 calibrated by standard platinum resistance thermometer
11 maintained by ICL, which is in turn certified by NIST.

12 Q. And where have you learned this from?

13 A. From conversations with Sergeant Gullberg over the
14 last three years.

15 Q. How long does this certification process typically
16 take for a digital reference thermometer that you send to ICL
17 Laboratories if you know?

18 A. Well, until looking at -- until you drew my
19 attention to the dates on this, I would probably have not
20 known, but I see that the report was issued one day after it
21 was received, the thermometer was received, so my assumption
22 is it takes about a day.

23 Q. Have you ever actually been to the ICL Laboratory
24 in Florida?

25 A. No, I have not.

1 Q. Have you met with technical director J. Jeff Kelly?

2 A. No.

3 Q. Do you know what his educational background is?

4 A. No, I do not.

5 Q. Do you know what his qualifications are for the
6 job?

7 A. No. I have no personal knowledge of Mr. Kelly or
8 his qualifications.

9 Q. Do you know what his duties are at ICL?

10 A. He's the technical director of the laboratory.

11 Q. Do you know what those duties entail?

12 A. No.

13 Q. Have you ever talked to him by phone?

14 A. No.

15 Q. I take it, then, you didn't discuss with him the
16 specific test performed on digital reference thermometer
17 091800?

18 A. That's correct.

19 Q. Have you had any correspondence between you and
20 this Mr. Kelly?

21 A. No.

22 Q. Any e-mails between the two of you?

23 A. No.

24 Q. Do you know the technical services vice president,
25 Bruce Markey?

1 A. No.

2 Q. And do you know what his educational background is?

3 A. No.

4 Q. Do you know his qualifications for the job?

5 A. No.

6 Q. Do you know what the duties are for an ICL

7 technical services vice president?

8 A. No.

9 Q. Have you ever talked to Mr. Markey by phone?

10 A. No.

11 Q. Have you had any correspondence with Mr. Markey?

12 A. No.

13 Q. Any e-mails between the two of you?

14 A. No.

15 Q. Have you ever met the technologist Deborah Weber?

16 A. No.

17 MS. DANPULLO: Objection to relevance to this line
18 of questioning.

19 HEARING OFFICER LANGE: I would overrule the
20 objection. I think the makers of the document go to the
21 issue of what he knows about ICL Labs and the making of that
22 particular certification, and that is an issue before us,
23 because we're talking about whether the digital reference
24 thermometers were properly certified.

25 Q. (BY MR. SMITH) Going back to the technologist

1 Deborah Weber, do you know what her educational background
2 is?

3 A. I do not.

4 Q. Do you know what her qualifications for the job
5 are?

6 A. No, I don't.

7 Q. Do you know what the duties of an ICL technologist
8 are?

9 A. No, I do not.

10 Q. And have you ever talked with her -- I believe you
11 said you've had no contact with her; is that correct?

12 A. That's correct.

13 Q. Any correspondence between the two of you?

14 A. No.

15 Q. Any e-mails?

16 A. No.

17 Q. How about Karen Alleborn. Do you know her?

18 A. No.

19 Q. Do you know her educational background?

20 A. No.

21 Q. Job qualifications?

22 A. No.

23 Q. Had any e-mails or correspondence with her?

24 A. No.

25 Q. How about Lori Parr? Do you know what her

1 educational background is?

2 A. No.

3 Q. Qualifications for the job?

4 A. No.

5 Q. Duties at ICL Labs?

6 A. No.

7 Q. Any communication with her in written form?

8 A. No.

9 Q. Or by e-mail?

10 A. No.

11 Q. Now, is it your understanding, Dr. Logan, that the
12 ICL Laboratories has provided the breath test section with a
13 similar document -- and I'm referring to Exhibit 4 now -- for
14 each and every digital reference thermometer?

15 A. Yes.

16 Q. And what's your understanding as to how many
17 thermometers the state patrol has?

18 A. I believe we have 14 or 15.

19 Q. Rather than take you through 14 or 15 exhibits from
20 ICL Labs on each of those digital reference thermometers, I'm
21 going to ask if your answer would be substantially the same
22 in terms of the documentation from ICL Calibration
23 Laboratories as to each and every one of those digital
24 reference thermometers owned by the state patrol. Was that
25 too complex?

1 A. Was that a question?

2 Q. It was. I'm asking you if your answer would be
3 substantially the same as to every single digital reference
4 thermometer in terms of what paperwork has been provided to
5 you by the ICL Laboratories.

6 A. Substantially, I think. There's -- over time
7 there's some different language that's been used in various
8 different reports on different digital reference
9 thermometers, but substantially I would agree.

10 Q. This may clarify, then. At any time, have you had
11 any contact with anyone directly at ICL Laboratories -- when
12 I say directly, I mean a phone call, an in-person visit, an
13 e-mail, or correspondence -- as to any individual report on
14 NIST digital thermometers that you sent to them?

15 A. No, I have not.

16 MR. SMITH: Thank you. I have no further
17 questions.

18 HEARING OFFICER LANGE: Is that for all five of
19 yours, for all five of your clients?

20 MR. SMITH: Yes, although I've indicated I reserve
21 the right to use anything developed in the record.

22 HEARING OFFICER LANGE: I understand.

23 Ms. DanPullo?

24 MS. DANPULLO: Your Honor, at this time we would
25 ask to admit the ICL calibration reports that were previously

1 submitted as exhibits, and we'd ask to admit all of those. I
2 believe they're Exhibits 1 through 34 or have been -- they're
3 marked with sticky numbers 1 through 34.

4 HEARING OFFICER LANGE: What will be marked as
5 Exhibit 6 through -- I think it's 6 through -- well, just to
6 make it simple, 6 through 40 will be the ICL calibration
7 reports originally provided to this hearing officer by the
8 Fox Bowman firm and Diego Vargas and Drue Kirby.

9 MR. VARGAS: No objection. We'd ask that they be
10 admitted also.

11 MR. SMITH: If I haven't done it already, we'd be
12 moving for the admission of Exhibits 1 through 5 that I've
13 covered.

14 HEARING OFFICER LANGE: They will also be admitted.
15 (DeMarre Exhibits Nos. 1 - 5 were admitted into
16 evidence.)

17 MS. DANPULLO: Your Honor, in addition, I think
18 that Ms. Kirby originally also marked -- put a sticky note as
19 Exhibit 37 for all of the NIST certifications and NIST
20 reports, instead of individually, and so we would ask the
21 remaining ones --

22 HEARING OFFICER LANGE: We haven't really dealt
23 with the NIST issue yet. The certification of the NIST
24 platinum thermometers, that hasn't been raised.

25 MR. VARGAS: We have no objection with the

1 admission of those documents at this time.

2 MS. DANPULLO: Your Honor, I believe we admitted
3 number 5, which is a report --

4 HEARING OFFICER LANGE: You're correct. So those
5 would be -- it was marked as 38. It has a sticky on it. But
6 that will be 41.

7 MS. DANPULLO: Thank you, your Honor. And that
8 would be all the reports from the NIST --

9 HEARING OFFICER LANGE: That should be all the
10 reports that I received from counsel.

11 MS. INGLIS: And if I may, your Honor, I think we
12 need to have a 5. I think the 5 was missed on this.

13 HEARING OFFICER LANGE: It's not going anywhere.
14 When we take a break, I'll provide the 6 through 41 for
15 marking.

16 MR. VARGAS: Does the court reporter need a break?

17 HEARING OFFICER LANGE: We've been going half an
18 hour. Let's take about five or ten. At 12:30 we'll
19 reconvene.

20 (Recess taken.)

21 (DeMarre Exhibit Nos. 6 - 50 were marked for
22 identification.)

23 (DeMarre Exhibit Nos. 6 - 42 were admitted into
24 evidence.)

25 HEARING OFFICER LANGE: We are back on the record.

1 Counsel, did you want to inquire?

2 MS. DANPULLO: I did, your Honor. Thank you.

3 EXAMINATION

4 BY MS. DANPULLO:

5 Q. The first declaration that we referred to, Exhibit
6 No. 1, was that a true -- is that a true declaration?

7 A. Yes, it is.

8 Q. And prior to June 10, was there any thermometer
9 that you approved for use in the breath testing program?

10 MR. BIANCHI: I'd object. Beyond the scope of
11 questions.

12 HEARING OFFICER LANGE: This is a fact-finding
13 inquiry in the civil proceeding, and I think it's relevant to
14 the issues before us, so I'm going to allow it.

15 Q. (BY MS. DANPULLO) Prior to June 10 of 2004, did you
16 approve any thermometers for the breath test program?

17 A. Yes.

18 Q. And what were those thermometers?

19 A. They were the mercury-in-glass thermometers that
20 have been used in the breath test program since I came here
21 in 1990, since before I came here in 1990.

22 Q. And how would anybody know that you approved those
23 prior to the June 10 declaration and/or the revision of the
24 WAC?

25 A. They're an integral part of the Guth 34C wet bath

1 simulator. The simulator can't operate without it, and
2 that's the simulator that was approved for use in
3 Washington's program. Then the thermometers are referred to
4 in numerous places in the breath test section's policy and
5 procedures manual, for which I've approved numerous
6 iterations over the last 14 years.

7 Q. Thank you. Regarding the July 13 affidavit noted
8 as Exhibit No. 2, is that a true declaration?

9 A. Yes, it is.

10 Q. And have you seen Exhibit No. 47, the DataMaster
11 certification?

12 MS. DANPULLO: Do we have that for Dr. Logan to
13 look at?

14 HEARING OFFICER LANGE: Okay. We have not admitted
15 what has been marked as Exhibit 47. It's being handed to
16 Dr. Logan.

17 MS. DANPULLO: At this time, we'd move to admit
18 that, your Honor.

19 HEARING OFFICER LANGE: Any objections?

20 MR. VARGAS: No objection. At this time, I'd move
21 to admit Exhibits 30 -- 42 through 47, I think.

22 HEARING OFFICER LANGE: 43 through 46. That's 47.
23 Any objections, anybody?

24 MS. DANPULLO: No, your Honor.

25 HEARING OFFICER LANGE: That's admitted, then.

1 (DeMarre Exhibit Nos. 43 through 47 were admitted
2 into evidence.)

3 Q. (BY MS. DANPULLO) The document, Exhibit 47, can you
4 tell us what that is?

5 A. This is a document that I referenced earlier, which
6 is a collection of reports from each of the breath test
7 technicians that reflect DataMaster serial number, the
8 thermometer serial number associated with that DataMaster,
9 the instruments location, and the date on which the
10 mercury-in-glass thermometer was certified, and it indicates
11 on there the date which that particular technician's digital
12 reference thermometer was certified, which they used in order
13 to make that separate certification.

14 Q. And in your earlier testimony, you said you
15 reviewed the records of each individual technician and their
16 certification of the thermometers. Is that -- are those the
17 documents you referred to earlier?

18 A. Yes.

19 Q. And you personally verified the last date that --
20 the earliest date and the latest date that those
21 certifications were done prior to signing your declaration,
22 Exhibit No. 2?

23 A. Yes, I did.

24 Q. Are you familiar with generally what's required to
25 establish traceability to the standards maintained by NIST?

1 A. I believe so, yes.

2 Q. Can you tell us what that means, what that
3 technical term means?

4 A. I think I may have answered that question earlier,
5 so I'll try and give the same answer.

6 HEARING OFFICER LANGE: Stop a minute. Okay.
7 We're back on the record.

8 A. I said I think I answered that question earlier, so
9 I want to make sure I give the same answer. It is that we're
10 able to establish an unbroken chain of comparisons with
11 stated uncertainty at each level.

12 Q. (BY MS. DANPULLO) And are you familiar with how the
13 Washington State Patrol test program tries to --

14 A. Sorry. Let me clarify that last answer too. That
15 means from the digital reference thermometer back to the NIST
16 standard.

17 Q. Are you familiar with how the Washington State
18 Patrol breath test program tries to establish that
19 traceability back to NIST?

20 A. Yes.

21 Q. And can you explain that process?

22 A. It's based on reliance on the certificates issued
23 by ICL Certification Laboratories with respect to their
24 certification of our digital reference thermometer and their
25 representation of the subsequent traceability back to NIST.

1 Q. And besides -- have you reviewed the documents that
2 are provided by NIST, currently Exhibit 43, 44, 45, and 46,
3 including the NIST policy on traceability and frequently
4 asked questions?

5 A. I'd like to see those exhibits.

6 HEARING OFFICER LANGE: There you go. Ignore the
7 yellow messages. They don't mean anything anymore.

8 A. I'm sorry. Can you repeat your question for me?

9 Q. (BY MS. DANPULLO) Have you had an opportunity to
10 review those documents?

11 A. Yes, I have, and, again, not specifically for the
12 purposes of this hearing, but over the last two or three
13 years I have, yes.

14 Q. Is there anything that you're aware of in a NIST
15 document that requires you to visit the lab that does your
16 certification of your digital reference thermometer?

17 A. No.

18 Q. And why is it that you can look at just one of the
19 ICL Labs or several of the ICL Lab reports and know that your
20 program meets the requirements of having the digital
21 reference thermometer trace back to the standards of NIST?

22 A. Because that laboratory is independently accredited
23 by a number of other accrediting organizations as meeting the
24 standards -- the highest standards required by --

25 HEARING OFFICER LANGE: We're going to have to take

1 five minutes, because we can't do this. The court reporter
2 can't hear. We're not going to make a decent record, so we
3 gotta stop.

4 (Recess taken.)

5 HEARING OFFICER LANGE: Back on the record. At
6 this time, Ms. DanPullo, are you --

7 MS. DANPULLO: Can I have the court reporter read
8 back the last question, please?

9 (The reporter read back as requested.)

10 A. In general, I rely on the reports because ICL is a
11 reputable certified laboratory, and the format and content of
12 their reports meets the requirements of the NIST documents to
13 support claims of traceability.

14 Q. (BY MS. DANPULLO) Does the report tell you
15 everything you need to know regarding traceability?

16 A. It tells me everything I need to know, yes. It
17 doesn't -- it references other documents that contain a lot
18 of the detail for methods and procedures that they may have
19 used for their certifications, but it tells me that they have
20 complied with the requirements.

21 Q. And the requirements meaning the requirements
22 needed to maintain NIST traceability?

23 A. To sustain a claim of traceability to NIST, yes.

24 Q. In determining what program or how the breath test
25 program was going to establish NIST traceability, besides

1 looking at the ICL Lab documents and discussing with Sergeant
2 Gullberg, was there anything else you relied upon to make
3 your determination?

4 A. I did review the additional documents supplied by
5 NIST that support the claims of traceability between ICL and
6 NIST.

7 Q. Anything else that you relied on?

8 A. No.

9 Q. Have you had an opportunity to review transcripts
10 from a case State v. Jagla?

11 A. Yes, I have.

12 MS. DANPULLO: Your Honor, we'd ask to move to
13 admit that exhibit now.

14 HEARING OFFICER LANGE: Okay.

15 MR. VARGAS: No objection. I think we've admitted
16 them previously.

17 HEARING OFFICER LANGE: I think we did admit them
18 prior to the last break.

19 MR. VARGAS: For the record, no objection to the
20 admission of those documents at this time.

21 MS. DANPULLO: Would that be 48?

22 HEARING OFFICER LANGE: I'm not sure. Let me get
23 them. That would be 48, which is the April 29 session, and
24 49 with attachments, which is the May 23 session of 2003.

25 (DeMarre Exhibit Nos. 48 and 49 were admitted into

1 evidence.)

2 Q. (BY MS. DANPULLO) Did you review any of the
3 transcripts now submitted as Exhibit 48 and 49 in determining
4 what your direction would be in regards to traceability to
5 NIST establishing that traceability?

6 A. Yes, I did. At the time that we made the change
7 from submitting our thermometers through Bostec and Guth to
8 submitting them directly to ICL, I did that in the context of
9 the testimony that I had heard in the hearings in Bellevue
10 and in Seattle from Dr. Emery, and also I had had a
11 discussion with Dr. Emery in District Court in Bellevue
12 concerning his opinions while we were both there for
13 testimony, and that influenced my decisions about the methods
14 that I approved for establishing that chain of traceability.

15 Q. And when you say his testimony and your
16 conversations, can you recall specifically what influenced
17 you that he had said?

18 A. Well, in his testimony both in Seattle and in
19 Bellevue, he referenced -- he compared and contrasted the
20 documents that Bostec and Guth had produced to support their
21 claims of traceability with the documents that had been
22 produced by ICL, and he characterized them, I think, as
23 exemplary documents or ideal documents, because they
24 contained all the information he needed in order to be able
25 to accept their claim of traceability to NIST.

1 Q. And I'm sorry. Which documents did he claim were
2 exemplary documents as far as traceability to NIST?

3 A. Documents such as -- well, the ICL Laboratory
4 report such as Exhibit No. --

5 Q. 6 through 41?

6 A. Well, Exhibit No. 4, which is the one that I
7 referred to specifically on here.

8 Q. Thank you. Now, was your declaration -- you
9 eventually signed declaration number 2, Exhibit No. 2; is
10 that correct?

11 A. Yes, I did.

12 Q. And when you signed that, did you believe that to
13 be a true declaration?

14 A. Yes.

15 Q. And was that based upon all the information we've
16 just discussed?

17 A. Yes.

18 Q. In your declaration that's currently marked as
19 Exhibit No. 3 dated August 4, there was a change in language
20 on that declaration. Do you recall what the change in
21 language was?

22 A. I'm sorry. Exhibit No. 3?

23 Q. Yes. Between Exhibit No. 2 and Exhibit No. 3, what
24 language was changed in Exhibit No. 3?

25 A. Well, I mean, I don't recall without reviewing the

1 documents, but if I was to put them side by side and compare
2 them, it's largely, I believe, semantics.

3 Q. And was any of the dates -- were any of the dates
4 changed other than the date that you signed the document
5 within Exhibit No. 3 in compared to Exhibit No. 2?

6 A. Yes.

7 Q. And what dates were those?

8 A. Well, the date of December 12, which was the last
9 date on which any field thermometer was certified against a
10 digital reference thermometer that had been certified by ICL,
11 that date remains unchanged. It's still December 12.

12 I had inserted into Exhibit No. 2, my declaration,
13 the earlier date of March 19, because I wanted to reflect the
14 fact that we had begun that process considerably earlier than
15 December and that there were going to be thermometers that
16 had undergone that process of certification with thermometers
17 directly traceable to NIST prior to December 12, because I
18 didn't want anybody to assume that simply because -- that
19 simply every test prior to December 12 did not have a
20 sustainable claim of traceability.

21 Q. Is your declaration a true declaration in Exhibit
22 No. 3?

23 A. Yes.

24 Q. And it was -- in your opinion, was there any need
25 for you to go back and review this document that you reviewed

1 prior to signing Exhibit 2 before signing Exhibit 3?

2 A. No. I don't believe there was any requirement, but
3 I can tell you that I in fact did do that, because I was
4 anxious that when I put that date of December 12 in there
5 that it was an accurate date.

6 Q. On document number 4, earlier opposing counsel
7 asked you if you relied on those or if the ICL Lab reports
8 were just for proof in a criminal case or in a DOL hearing.
9 Do you also rely on those to establish traceability pursuant
10 to your WAC?

11 A. Yes.

12 MS. DANPULLO: I have nothing further.

13 HEARING OFFICER LANGE: Mr. Smith, do you have any
14 follow-up?

15 MR. SMITH: No.

16 HEARING OFFICER LANGE: Mr. Vargas, then.

17 MR. VARGAS: Thank you, your Honor.

18 EXAMINATION

19 BY MR. VARGAS:

20 Q. Good afternoon, Dr. Logan.

21 A. Good afternoon.

22 Q. Have you had an opportunity to review the ICL
23 certifications for the digital thermometers provided by the
24 Washington State Patrol to ICL for certification?

25 A. I'm not sure what you're --

1 Q. If you look at exhibits -- I believe they're
2 Exhibits 6 through 42.

3 HEARING OFFICER LANGE: 41.

4 Q. (BY MR. VARGAS) 6 through 41. Have you reviewed
5 those documents prior to this hearing?

6 A. Many of them I have, but I don't expect that I
7 would read all of them, no.

8 Q. And these documents are used to support your
9 assertion that the digital reference thermometers employed by
10 the Washington State Patrol to certify the simulator solution
11 thermometers are traceable under the standards. Is that fair
12 to say?

13 A. Yes.

14 Q. Do you happen to know what is required to establish
15 traceability to NIST standards?

16 A. I think I believe I have a general user's
17 understanding of that process. There's a lot of detail
18 involved in that process that I would not claim to be
19 familiar with.

20 Q. And what is your general understanding of the
21 process?

22 A. That the digital reference thermometers that we
23 supply to ICL are tested against the standards that ICL has
24 determined and documented are traceable to NIST; that the
25 thermometers are tested at multiple times at multiple

1 different temperatures, at three different temperatures; and
2 that ICL reports on that document -- well, it references the
3 procedures that we use, it references the standards, the NIST
4 standards and ISO standards that they are in compliance with,
5 it references the methods they use to compute uncertainty,
6 and it reports the uncertainty on these measurements.

7 Q. Are you personally familiar with the standards that
8 are used by ICL for that process?

9 A. I'm familiar with some of the documents that they
10 reference, yes.

11 Q. But are you familiar with what the actual standards
12 from NIST require ICL to do?

13 A. I think I've answered that to the extent that I'm
14 not familiar with a lot of that detail, no.

15 Q. So is it fair to say that you're not familiar with
16 the procedures necessary to be performed by ICL to establish
17 traceability to the NIST standards? With respect to that I
18 mean the actual testing methodology that's used by ICL.

19 A. Well, I want to be careful with my answer to that
20 question isn't misinterpreted. I don't claim to be an expert
21 in certification of thermometers. I wouldn't be qualified to
22 go and work in ICL's laboratory or to perform the procedures
23 that they use and to provide the services they provide for
24 us.

25 I rely on their representation of the procedures

1 and processes that they use, I rely on their representation
2 of the fact that they're in compliance with standards that
3 are set by NIST, and I accept the data that they provide as
4 part of the service that we receive from them is accurate and
5 reliable in terms of making our determination that we've met
6 the standard that's been set in the administrative code.

7 Q. So is it fair to say that you have no personal
8 knowledge of the required testing methodology by NIST that is
9 to be employed by ICL? Is that fair to say?

10 MS. DANPULLO: Objection; asked and answered.

11 HEARING OFFICER LANGE: I agree.

12 Q. (BY MR. VARGAS) Could you please repeat your
13 answer, because I don't think I've asked that specific
14 question.

15 HEARING OFFICER LANGE: Could you read his answer
16 back, the last answer back for Dr. Logan?

17 (The reporter read back as requested.)

18 HEARING OFFICER LANGE: The objection is sustained.

19 Q. (BY MR. VARGAS) So is it fair to say that your
20 opinion with respect to the ICL certifications is based on
21 the assumption that they're following proper procedures and
22 referencing standards that are in effect by different
23 standardizing organizations?

24 A. Yes. I think that's accurate.

25 Q. So, for example, if they reference an ISO standard,

1 your faith in this document is based on the fact that you in
2 fact are accepting their word that they're complying with ISO
3 9000?

4 A. If that's the standard that's referenced, yes. And
5 they are an accredited laboratory by the American Association
6 for Laboratory Accreditation as well as by ISO and by ANSI,
7 American National Standards Institute, so it's not -- I don't
8 believe that it's an arbitrary reliance on a laboratory about
9 which I know nothing.

10 I accept the fact that these organizations that
11 accredit calibrating laboratories are far better able to
12 assess the capabilities of those laboratories than I am.

13 Q. But you would agree with me that you're not
14 familiar with NIST individuals that created this, any one of
15 these ICL reports. Is that fair to say?

16 HEARING OFFICER LANGE: I would object, because
17 that's already been asked and answered.

18 Q. (BY MR. VARGAS) You referenced discussions with
19 Dr. Emery before, and you and Dr. Emery both testified in
20 State versus Jagla as well as Seattle versus Wanda
21 Clark-Munoz; is that correct?

22 A. Yes.

23 Q. And you had an opportunity to discuss with him to
24 some degree your testimony before both of those tribunals?

25 A. No. No.

1 Q. You mentioned earlier that you spoke with Dr. Emery
2 about the ICL documentation in comparison to the Bostec
3 documentation; is that correct?

4 A. Well, I think what I said in my testimony was that
5 I had heard him testify with respect to both of those
6 processes, the processes that were used by Bostec and the
7 processes that were used by ICL and the documents that both
8 of those laboratories produced.

9 I did have a discussion with him in the lobby of
10 the courthouse during a recess where I discussed the
11 acceptability -- subsequent to his testimony I discussed the
12 acceptability of the ICL documents with him.

13 Q. And your testimony and Dr. Emery's testimony dealt
14 with the -- in State versus Jagla dealt with the NIST
15 traceability; is that correct?

16 A. Yes. Yes.

17 Q. Would you agree with me that Dr. Emery is an expert
18 on metrology?

19 A. Yes.

20 Q. And an expert on thermometry?

21 A. Yes.

22 Q. Now, earlier you testified that you reviewed some
23 NIST documents in conjunction with accepting the or relying
24 upon the ICL documents that you received. I believe you
25 testified I think it was during cross-examination that when

1 making your conclusion that the documents were traceable to
2 standards maintained by NIST you received the ICL
3 Laboratories certifications as well as some other documents
4 supplied by NIST or that you received from NIST.

5 A. Yes. I was referring to Exhibit 5 and similar
6 documents and I guess Exhibits 42 -- Exhibit 42.

7 HEARING OFFICER LANGE: 46.

8 MS. DANPULLO: No. That's 42. That's correct.

9 HEARING OFFICER LANGE: Oh, it is 42, yes.

10 Q. (BY MR. VARGAS) Did you review any other documents
11 from NIST in making your determination?

12 A. You mean any documents?

13 Q. Correct.

14 A. Well, I referenced earlier that I was familiar with
15 their 1297 as well as the documents that I had seen numerous
16 times on traceability from their web site.

17 Q. Now, let me ask you this. You testified earlier
18 that -- with respect to the approval of the mercury-in-glass
19 thermometer for use in the simulator. Can you tell me how
20 and when you made the approval of using a mercury-in-glass
21 thermometer for that purpose?

22 MS. DANPULLO: I'm sorry. The question is
23 confusing. I'm not sure for what purpose.

24 HEARING OFFICER LANGE: And I would agree.

25 MR. VARGAS: I believe that the AG had Dr. Logan

1 testify with respect to approval of a thermometer for use in
2 the simulator solution to check its temperature. I believe
3 that Dr. Logan -- it's my recollection that Dr. Logan
4 testified that this approval occurred in fact -- that the
5 thermometer was used prior to his coming on board as the
6 state toxicologist and the approval was as far back when the
7 simulator itself was approved for that purpose, and I want to
8 ask him when he specifically approved of the mercury-in-glass
9 thermometer.

10 I believe it's relevant for two purposes. One, I
11 think it's proper examination after it was brought out by the
12 other side, but, number two, it's my assertion that
13 Substitute House Bill 3055 amended RCW 46.61.506 section 4 to
14 require that the temperature of the simulator solution be
15 obtained by a thermometer that was approved by the state
16 toxicologist and that that had to be done prior to the start
17 of the test.

18 It's one of my arguments that for tests conducted
19 prior to June 10, the effective date of that amended law,
20 that it's still a necessary requirement for the Department of
21 Licensing to establish in order to support admissibility of
22 the breath test results. Therefore, I think it's relevant to
23 establish if and when he approved of such a thermometer,
24 because the tests conducted in one of my client's cases was
25 prior to June 10.

1 HEARING OFFICER LANGE: The objection was to was
2 the question confusing. I thought it was. With the question
3 as rephrased, do you understand it, Dr. Logan?

4 THE WITNESS: Yeah. I think so.

5 Q. (BY MR. VARGAS) Let me rephrase it. When did you
6 first approve of a mercury-in-glass thermometer to be used in
7 the simulator solution to obtain the simulator solution's
8 temperature?

9 A. It would have been the first time in which I
10 approved the policy and procedures manual for the breath test
11 section of the state patrol, which would have been sometime
12 in 1990, late 1990.

13 Q. And did you -- in that policy and procedure manual,
14 did you specifically approve a specific type of thermometer?

15 A. Not to the extent that it's described in 448-13-020
16 as amended on June 10. However, the policy and procedures
17 manual refers to the use of the thermometer in the simulator
18 to determine the temperature 34 degrees plus or minus .2
19 degrees. That's the only thermometer that's ever been used
20 in that simulator.

21 Q. So could you have replaced it with any type of
22 thermometer you chose to?

23 A. Could I have replaced it with any type of
24 thermometer I chose to? I would have had no reason to do
25 that.

1 Q. I mean, at that point in time, were breath test
2 technicians required to purchase a particular model or type
3 of thermometer for use in the simulator solution?

4 HEARING OFFICER LANGE: I'm not sure that that's
5 the process that the breath test technicians did the ordering
6 or -- I don't think we've laid a foundation here.

7 Q. (BY MR. VARGAS) Who is responsible for ordering the
8 simulator solution thermometers?

9 A. Well, in the first instance, they are supplied with
10 the Guth simulator. They come with the simulator. In the
11 event that one gets broken or damaged, it would be reordered
12 from Guth by the breath test section.

13 Q. So the simulator thermometer is in fact a separate
14 device from the actual simulator; is that true?

15 A. Well, you can't use the simulator without it, so in
16 my opinion, it's a component of the Guth 34C simulator.

17 Q. So are you --

18 A. And, in fact, when the Guth 34C simulator is on the
19 Federal Department of Transportation's conforming products
20 list for calibrating devices for breath test instruments,
21 then it comes complete with a mercury-in-glass thermometer
22 capable of measuring 34 degrees plus or minus .2 degrees.

23 Q. Are you saying the simulator will not work without
24 the mercury-in-glass thermometer?

25 A. You can't use it without the mercury-in-glass

1 thermometer, because you need to know what temperature it's
2 operating at in order to produce a usable vapor standard of
3 ethanol.

4 Q. Well, the actual simulator which connected to the
5 DataMaster hypothetical -- let me ask you this. Are you
6 familiar with the DataMaster?

7 A. Yes.

8 Q. Are you familiar with the simulator that attaches
9 to the DataMaster?

10 A. Yes.

11 Q. Are you familiar with how the two items function?

12 A. Yes.

13 Q. And how they function in conjunction?

14 A. Yes.

15 Q. If an operator were to conduct a BAC test without
16 the simulator attached to the DataMaster, would the test go
17 through?

18 A. No.

19 Q. Why would it not go through?

20 A. Because the instrument needs an external standard
21 in order to complete the test.

22 Q. Now, if the DataMaster had a simulator attached to
23 it and the simulator did not have a mercury-in-glass
24 thermometer in it, would the DataMaster complete a test?

25 A. No.

1 Q. Why would it not complete a test?

2 A. Because the operator is required to indicate that
3 the temperature of the solution is 34 degrees plus or minus
4 .2 degrees before the test would begin, and without a
5 thermometer, he couldn't make that determination.

6 Q. So the mechanics of the machine would not prohibit
7 the test from being conducted; is that correct?

8 A. Yes, they would.

9 Q. Is it only because an operator would have to put no
10 when asked the question with respect to the temperature of
11 the simulator solution?

12 A. That's correct.

13 Q. So it required the operator to answer that question
14 in the negative for the test to fail to go through; is that
15 correct?

16 A. Yes.

17 Q. If an operator were to conduct that test with a
18 simulator attached to the DataMaster with no thermometer and
19 hit yes during that test, would the machine perform the test?

20 A. It depends what temperature the simulator solution
21 was at. If it wasn't in the appropriate range, then the
22 simulator result would not be accepted by the instrument or
23 the test, so it's dependent on the temperature of the
24 solution.

25 Q. How would the machine know the temperature of the

1 solution if the operator hit yes in response to that
2 question?

3 A. It wouldn't know the temperature, but if the
4 simulator wasn't turned on and the solution wasn't at 34 plus
5 or minus .2 degrees, the value of the vapor standard produced
6 by the simulator provided by the simulator to the instrument
7 would be such that it would not accept the result and it
8 would abort the test.

9 Q. So you're saying if the results of the simulator
10 test were lower than .072 or above .088, the test would fail
11 to complete?

12 A. Yes.

13 Q. Assuming that there's no thermometer in the
14 simulator solution, that the operator hit yes in response to
15 the question, and the simulator solution test results were
16 between .072 and .088, would the machine complete the test?

17 A. Yes.

18 Q. So in reality, if the operator hits yes and the
19 simulator tests within the proper range, the machine would
20 conduct the test without the mercury-in-glass thermometer?

21 A. It would go through the mechanics of the test, yes.
22 It wouldn't be a valid test.

23 Q. Correct. It wouldn't be valid, but it would still
24 perform a test. Is that fair to say?

25 A. Yes.

1 Q. So is it fair to say that the mercury-in-glass
2 thermometer is required for a valid test to be --

3 MS. DANPULLO: Objection; asked and answered.

4 HEARING OFFICER LANGE: I agree. He just answered
5 it. He said it would not be a valid test. It could complete
6 a test, but it would not be a valid test. So that's
7 sustained.

8 MR. VARGAS: Okay.

9 Q. (BY MR. VARGAS) When you came on board the
10 mercury-in-glass -- you joined the Washington State Patrol in
11 what year?

12 A. 1990. Well, the Washington State Patrol I joined
13 in 1999.

14 Q. And when were you -- when did you assume the role
15 of state toxicologist?

16 A. 1990.

17 Q. And prior to 1999, did you approve of any
18 thermometer to be used in the simulator?

19 MS. DANPULLO: I'm sorry. Was it 1989?

20 MR. VARGAS: No. 1990. 1999.

21 Q. (BY MR. VARGAS) Prior to 1999, did you make any
22 approval of any thermometer to be used in the simulator?

23 A. My answer would be the same as my prior answer. I
24 approved policies and procedures for the breath test section
25 of the state patrol in 1990.

1 Q. I'm sorry. So as of 1990 is when you began
2 approving the policy and procedure manual; is that correct?

3 A. Yes.

4 Q. Now, it's your assertion that approval of the
5 policy and procedure manual was equivalent to approval of the
6 thermometer or -- is that what you're suggesting?

7 A. Yes.

8 Q. And that it was your specific intent at that time
9 when you enacted the policy and procedure manual to approve a
10 specific thermometer for use in that simulator?

11 A. Well, it was my view, although I don't think I
12 analyzed it to this degree, that the thermometer was a
13 component of the simulator, and the simulator has a number of
14 different components. It has a thermostat. It has a paddle.
15 It has a baffle. It has in ports and out ports. It has an
16 indicator light.

17 I didn't approve any of the separate components of
18 the simulator. I viewed the simulator because that's the
19 only way in which it's used in our breath test program is
20 with a mercury-in-glass thermometer in it to be a unit, and
21 it was approved as a unit.

22 Q. So you're maintaining that the simulator including
23 the thermometer is a single unit?

24 A. Yes.

25 Q. And that's been your position always?

1 A. Yes.

2 Q. And you came up with that position?

3 A. Yes. Like I said, I don't think I analyzed it to
4 that extent at the time, because the issue of the thermometer
5 had never been brought up as a separate issue, but since the
6 simulator is never used without the thermometer, I didn't
7 view it as requiring any kind of separate certification or
8 analysis.

9 Q. Well, did the Washington State Patrol ever use
10 digital thermometers to measure the temperature of the
11 simulator solution?

12 MS. DANPULLO: Objection as to scope.

13 HEARING OFFICER LANGE: Actually, it is beyond what
14 we're doing here, because we're trying to figure out the four
15 issues that are in front of me and all of the hearing
16 officers, and that is was the thermometer certified according
17 to the methods approved by the state toxicologist as well as
18 the other parts of it, so the potential use of a digital
19 reference thermometer is beyond the scope of this hearing.

20 MR. VARGAS: Oh, no, no, no. For the record, let
21 me clarify what I'm doing. It's my belief that digital
22 thermometers were used at some point from 1990 to now to test
23 the temperature of the simulator solution during the process
24 of taking a breath test. It is Dr. Logan's testimony that he
25 approved the mercury-in-glass thermometer for use in the

1 simulator beginning in 1990 when he approved of the simulator
2 itself.

3 HEARING OFFICER LANGE: You're asking him, then,
4 did that ever change from 1990 to the present?

5 MR. VARGAS: At any point from 1990 to the present,
6 was a digital thermometer ever used to test the temperature
7 of the simulator solution during the conduction of a test?

8 HEARING OFFICER LANGE: I will allow that.

9 A. At one point maybe four years ago, the state patrol
10 purchased a different model of simulator. It was called a
11 Guth 2100, which has a digital thermometer. It's not a
12 separate thermometer. It's built in. It's a built-in
13 digital readout of the temperature.

14 Some of those were deployed in the field. That was
15 done without my specific approval. When I learned that they
16 were deployed and that they were not on the Federal
17 Department of Transportation's conforming products list, I
18 had them withdrawn from the field, and they have not been
19 used since.

20 Q. (BY MR. VARGAS) Now, with respect to the approved
21 thermometers and whether the inclusion of the thermometer
22 with the simulator and the approval of the simulator
23 constituted approval of the thermometer, did you have any
24 discussions with anybody about that?

25 A. I'm sorry. You'll have to ask me again.

1 Q. We've been talking about approval of a thermometer
2 and specifically your approval of a thermometer for use in
3 the simulator solution. Okay. Have you had any discussions
4 with anyone with respect to when you approved the thermometer
5 for use in the simulator?

6 A. No.

7 Q. You've never had any discussions with anyone
8 regarding that topic?

9 MS. DANPULLO: Objection; asked and answered.

10 HEARING OFFICER LANGE: Agreed. It's been asked
11 and answered. He said no.

12 Q. (BY MR. VARGAS) Have you ever spoken to Rod
13 Gullberg about that issue?

14 A. Sure, sure. Of course.

15 Q. And when did you speak to him?

16 A. Oh, on numerous occasions over the last 14 years.

17 Q. You spoke with him on numerous occasions about the
18 approval of a thermometer for use in the simulator?

19 A. No. Not about his approval, but about a
20 thermometer.

21 Q. Have you ever spoken to him about approval of a
22 thermometer for use in the simulator?

23 HEARING OFFICER LANGE: That is asked and answered.
24 He said that he did not talk to him about approval. He
25 talked about the thermometers but not about approval.

1 MR. VARGAS: No. I don't think he's answered the
2 question I just asked.

3 HEARING OFFICER LANGE: Could you read back the
4 last answer?

5 (The reporter read back as requested.)

6 MR. VARGAS: Could you read back the last question
7 also?

8 (The reporter read back as requested.)

9 MR. VARGAS: Can I have this marked as an exhibit?
10 (DeMarre Exhibit No. 51 was marked for
11 identification.)

12 HEARING OFFICER LANGE: It's entitled the
13 Washington State Patrol Request for Public Records from Garth
14 Dano & Associates. The date of request is July 15, 2004.
15 The location is Franklin County. I'm going to hand it to the
16 witness.

17 Q. (BY MR. VARGAS) Dr. Logan, if you could review that
18 document for a moment.

19 HEARING OFFICER LANGE: Off the record a minute.

20 (Discussion off the record.)

21 (Recess taken.)

22 HEARING OFFICER LANGE: Mr. Vargas.

23 Q. (BY MR. VARGAS) What's that number? What number is
24 that marked?

25 A. 51.

1 Q. Dr. Logan, have you had an opportunity to look at
2 what's been marked as Exhibit 51?

3 A. Yes, I have.

4 Q. Can you describe what it is?

5 HEARING OFFICER LANGE: Well, I don't think that's
6 necessary.

7 MS. DANPULLO: We would object to the use of this
8 document at this time. We don't believe it's relevant, and
9 Dr. Logan's already testified that he discussed the
10 mercury-in-glass thermometers with Sergeant Gullberg, and
11 this document does nothing but say the same thing.

12 MR. VARGAS: And in response to that, when we
13 reread the question, I asked Dr. Logan if he specifically
14 spoke to Sergeant Gullberg regarding approval of the
15 simulator solution thermometers, and he said, no, he had not.
16 I asked another question similar in context. They objected
17 asked and answered and you sustained the objection as asked
18 and answered. The court reporter read the information, and
19 that was the topic. Exhibit 52, page 3 --

20 HEARING OFFICER LANGE: 51.

21 MR. VARGAS: I'm sorry. -- 51, page 3,
22 specifically is an e-mail purported to be from Rod Gullberg
23 to Barry Logan and Shannon Inglis, and it talks about
24 approval of the Guth model 34C simulator, which included
25 approval of the mercury-in-glass thermometer, so this

1 contradicts the testimony that Dr. Logan stated earlier, so
2 what I'm trying to do is develop the line of testimony again
3 whether he spoke to Sergeant Gullberg about the approval of
4 the simulator solution thermometer and when that took place.

5 HEARING OFFICER LANGE: Well, what I'm seeing here
6 is Rod Gullberg and Craig Nelson. I don't see Dr. Logan
7 involved -- okay. I do see Dr. Logan involved in something
8 of July 19, 2004, talking about the policy manual, but I
9 don't see anything that shows that Dr. Logan had anything to
10 do with the first page of e-mails between Craig Nelson and
11 Rod Gullberg, and even the statement that is proposed is in
12 terms of Rod Gullberg and certainly not in terms of
13 Dr. Logan.

14 I do see the next page does discuss thermometer
15 certifications between Barry Logan and Rod Gullberg, which I
16 think is the same as consistent with his testimony. Okay. I
17 do see -- I do see on the next page a discussion between
18 counsel, Shannon Inglis, and Dr. Logan and Mr. Nelson
19 regarding a new proposed -- or a new WAC section and about an
20 ultimate -- so I don't think that it goes to the approval
21 issue other than the Logan/Gullberg e-mail of July 19, 2004,
22 so that would be the only page that I would allow to be
23 inquired about.

24 MR. VARGAS: So you're limiting it to the e-mail
25 dated July 19, 2004, time 3:37 p.m.?

1 HEARING OFFICER LANGE: That's the only one that I
2 see that talks about approval of thermometers.

3 MR. VARGAS: And I think in the page after that
4 from Shannon Inglis to Barry Logan and Craig Nelson cc'ing
5 Robin Reichert and Rod Gullberg it's a threaded e-mail
6 conversation with that e-mail where Dr. Logan is sending an
7 e-mail to Craig Nelson, Robin Reichert, Rod Gullberg, and
8 Shannon Inglis asking why this 448-13-020 needs to be
9 retroactive. "Is it your interpretation that the change in
10 the law is retroactive?" I believe 448 as amended beginning
11 June 10 is the WAC provision dealing with the approval of the
12 thermometer.

13 HEARING OFFICER LANGE: Okay.

14 MS. DANPULLO: Your Honor, I believe that goes to
15 the discussion on the WAC and when the WAC needs to be -- the
16 active date of that particular WAC, not whether or not a
17 thermometer should be approved, and if so, what thermometer,
18 and I agree with the Court's original decision that the only
19 one that's even halfway relevant would be the one page of the
20 e-mail from Rod Gullberg to Dr. Logan dated July 19 of 2004.

21 MR. VARGAS: Well, I would move for admission of
22 the entire exhibit. If the hearing officer decides that it's
23 not admissible, I'd like to make it as an offer of proof for
24 the purposes of the appellate record so that the appellate
25 court can consider whether or not it should have been

1 admitted under the rules of evidence as relaxed for these
2 proceedings. If the court is ruling that I'm limited to
3 questioning with respect to the July 19 e-mail, then I will
4 conduct my examination with that e-mail in mind.

5 HEARING OFFICER LANGE: And that's what I'm ruling.
6 I think the July 19 e-mail does indeed go to that in some
7 detail, but I don't think that there's any discussion in the
8 balance of the other four pages of e-mails of Exhibit 51 that
9 goes to the approval of the thermometers.

10 MS. DANPULLO: Your Honor, just for clarification
11 of the record, then, should we mark the exhibits separately
12 as I'm sure that counsel will move to admit the one page but
13 not necessarily the other four pages?

14 HEARING OFFICER LANGE: Well, it becomes part of my
15 record anyway. What I am going to do is only admit in this
16 record the one-page memorandum e-mail between Barry Logan and
17 Rod Gullberg of July 19, 2004.

18 MS. DANPULLO: Thank you, your Honor.

19 (DeMarre Exhibit No. 51 was admitted into
20 evidence.)

21 MR. VARGAS: May I proceed?

22 HEARING OFFICER LANGE: Please go ahead.

23 Q. (BY MR. VARGAS) Dr. Logan, you previously testified
24 that you had not -- Dr. Logan, you had previously testified
25 that you had not discussed the approval of a simulator

1 solution thermometer -- a mercury-in-glass simulator solution
2 thermometer with Rod Gullberg. Would you care to change your
3 testimony with respect to that issue?

4 A. Well, I apologize if my response to that question
5 seems at odds to what you presented here. I think if -- my
6 recollection of my testimony -- and I'd be happy to have the
7 record read back to me -- was you asked me if I had discussed
8 the thermometers with Sergeant Gullberg, and I indicated that
9 I had discussed it numerous times since 1990 --

10 Q. Would you like the question -- I'm sorry. Go
11 ahead.

12 A. Maybe once I give you where I'm coming from. And
13 then you asked me specifically if that was with respect to
14 approval of thermometers, and I indicated that no, meaning
15 not all of my conversations on thermometers since 1990 had
16 been with respect to approval.

17 So to that extent, this reflects a discussion that
18 I had approximately July 19 with Sergeant Gullberg where I
19 asked him to review policy and procedures manual for
20 references to mercury-in-glass thermometer in the current
21 policy and procedures manual.

22 Q. So you have discussed the approval of a simulator
23 solution thermometer with Sergeant Gullberg; is that correct?

24 A. Sure. Yes. And maybe in other instances too, but
25 I don't recall the specifics of the conversation. I mean, we

1 have a lot of conversations about issues in the breath test
2 program, so are there other e-mails out there where he sent
3 me something about approval of the thermometers? There may
4 be.

5 Q. And is this e-mail in front of you today -- do you
6 recall this threaded discussion?

7 HEARING OFFICER LANGE: I'm sorry. I'm not sure I
8 understand that.

9 Q. (BY MR. VARGAS) Do you recall the discussion that
10 took place in this e-mail?

11 A. Yes.

12 Q. And were there more communications with respect to
13 this subject than just this one e-mail?

14 A. No. Although I believe I did forward this
15 information to my legal counsel.

16 Q. I'm sorry. Your other who?

17 A. To my legal counsel, Ms. Inglis.

18 Q. And did you discuss the approval of the simulator
19 and the thermometer as a component of the thermometer with
20 anyone else at any other time?

21 A. Not that I can recall.

22 Q. I have no further questions. Thank you.

23 HEARING OFFICER LANGE: Ms. DanPullo.

24 MS. DANPULLO: Thank you, your Honor.

25 FURTHER EXAMINATION

1 BY MS. DANPULLO:

2 Q. You were asked some questions about the ICL Lab
3 report and what you know about their procedures inside their
4 laboratory.

5 A. Yes.

6 Q. Does the ICL Lab report show that ICL Lab is in
7 compliance with NIST, the report that you received?

8 A. It states that they are, yes.

9 Q. And is that what you rely on in making your
10 decision about your traceability, the Washington State Patrol
11 breath test program digital reference thermometer traceable
12 back to NIST?

13 A. In part, yes.

14 Q. Now, the traceability issue that we've been talking
15 about, does that relate to the digital reference thermometer
16 and the mercury-in-glass thermometer?

17 A. No.

18 Q. Can you explain that? Which one or both does it
19 relate to?

20 A. The requirement that I put in place in WAC in
21 448-13-035 referenced specifically the digital reference
22 thermometer. These digital reference thermometers which were
23 to be used in our program had to be traceable back to
24 standards maintained by NIST.

25 Q. And is that currently what your procedure is?

1 A. Yes, it is.

2 Q. And that's based upon the ICL Lab reports as well
3 as the NIST documents comparing --

4 A. Yes.

5 Q. -- ICL Lab's thermometer to NIST thermometer?

6 A. Yes.

7 MS. DANPULLO: I have no further questions.

8 HEARING OFFICER LANGE: Any follow-up?

9 MR. VARGAS: No. No further questions.

10 HEARING OFFICER LANGE: Mr. Bianchi.

11 MR. SMITH: Do we want to change seats so he's
12 closer to this microphone?

13 HEARING OFFICER LANGE: That probably would be a
14 good idea.

15 MR. VARGAS: I'm going to excuse myself so I can
16 spare Drue Kirby from having to deliver a presentation that
17 she's dying to deliver.

18 EXAMINATION

19 BY MR. BIANCHI:

20 Q. I guess as follow-up, if you were to find that ICL
21 were not in compliance with NIST, that would change your
22 opinion as to traceability, wouldn't it?

23 A. Yes.

24 Q. Can we have these other exhibits so I can deal with
25 those? Prior to today's date, I sent to you copies of

1 certain materials that you talked about that you had --
2 you're familiar with if not having glanced through them. Is
3 that fair to say?

4 A. Yes.

5 Q. What I'm going to do at this point is we have
6 Exhibit No. 48, which is the transcript of the electronic
7 hearing on April 29, 2003, in Ted Jagla. This is paginated
8 on the bottom starting with 001 through 261. That's part of
9 the materials that I supplied to you prior to today's
10 hearing.

11 A. Yes.

12 Q. And looking at Exhibit No. 49. It's Dr. -- it's a
13 continuation of Dr. Emery's testimony from May 23, 2003, and
14 handwritten and paginated in the lower right-hand corner
15 pages 262 and continuing on through pages 529. Is that part
16 of the documents that you were provided prior to today?

17 HEARING OFFICER LANGE: Well, I'd like to make a
18 clarification here. There are certain parts of that document
19 that are not going to be admitted because they are not
20 relevant to this hearing. That includes some of the exhibits
21 as well as some of the argument in here. So while it is the
22 May 23, 2004, I don't want anybody to become attached to any
23 of the pages, because that's ultimately not what's going to
24 be part of our record necessarily.

25 MR. BIANCHI: Well, I think that we're in agreement

1 that the closing argument out of the Jagla case would not be
2 included as part of the exhibits, nor would any of the
3 stipulations of the parties be included.

4 HEARING OFFICER LANGE: Okay. That's true. As
5 well as the Randhawa testimony.

6 MR. BIANCHI: Anything else?

7 HEARING OFFICER LANGE: That is all that comes to
8 mind at this point when I reviewed it.

9 MR. BIANCHI: So everything else there is coming
10 in?

11 HEARING OFFICER LANGE: The factual testimony would
12 be coming in.

13 MR. BIANCHI: And we had that discussion off the
14 record prior to today's date so that I was aware, and we
15 agreed there was no dispute that that was going to be the
16 situation. The closing arguments, the stipulations, and the
17 Randhawa transcript were not part of the --

18 HEARING OFFICER LANGE: That's what I want.

19 Q. (BY MR. BIANCHI) I'm going to show you Exhibit 50.
20 This is a transcript of proceedings out of the Clark Cruz
21 Munoz out of City of Seattle in the lower right-hand corner
22 paginated as pages 530 to through 673. Does that appear to
23 also be documents that I provided a copy to you for you to
24 attempt to glance through when you came back from vacation?

25 A. Yes. Yes, it is.

1 Q. And, again, these were the hearings that you
2 previously testified at personally?

3 A. Yes.

4 Q. And for records clarification purposes, Dr. Logan,
5 I wanted to clear up the fact that as relates to Exhibit
6 262 --

7 A. Exhibit 49?

8 Q. 49. Excuse me. -- starting with page 262 that it
9 came to my attention coming in today that the supplemental
10 materials supplied by NIST was in fact not the original
11 exhibit used in the Jagla hearing but a new pulldown from a
12 web site, so as far as these documents, it is the original
13 exhibit. I just wanted you to be aware of that.

14 So the copy you had that I gave you in this packet
15 starting on page 298 -- 299 of the packet you received was an
16 updated or brand new one, but that's been replaced in this
17 packet, so it doesn't read -- it doesn't have the same number
18 of pages because of the font. I wanted you to be aware of
19 that. Okay?

20 Now, in the Jagla hearing testimony, what was
21 listed as Exhibit D -- and that's why I brought this up to
22 reference was the supplemental -- it's called supplementary
23 materials, and also that's Exhibit 44 that's been admitted,
24 correct?

25 A. Yes.

1 Q. And you're familiar with that document. Is that
2 fair to say?

3 A. Yes. I've read it a couple of times.

4 Q. You've read it a couple of times. As a matter of
5 fact, you testified about it in the Jagla case?

6 A. I may have been asked questions about it, yes.

7 MS. DANPULLO: I'm sorry. I'm a little bit
8 confused. Are you referencing 44 or 46?

9 MR. BIANCHI: Let's do 44 at this point.

10 MS. DANPULLO: Is it the frequently asked questions
11 that you're looking at?

12 MS. INGLIS: That's not the exhibit number. That's
13 sticky. I believe it's actually 46.

14 MR. SMITH: Don't look at the post-it.

15 MR. BIANCHI: Don't look at the post-it. Sorry
16 about that.

17 MS. GREGG: For reference, instead of you giving
18 the exhibit, why don't we give the title of the document
19 along with the --

20 Q. (BY MR. BIANCHI) Actually, it's marked as Exhibit
21 46 for purposes of this hearing, the supplementary materials.
22 That's what I'm referring to at this point, and that is
23 before you at this point?

24 A. Yes.

25 Q. And this is a document for which you were

1 questioned about in the Jagla case, correct?

2 A. I may have been. I don't recall at this point.

3 Q. Well, do you remember if you were questioned about
4 that document in the Munoz case?

5 A. I've been questioned about it at some point. I
6 couldn't tell you at this point in which particular
7 proceedings that was.

8 Q. Well, would you say that you're familiar with that
9 document --

10 A. Yes.

11 Q. -- No. 46?

12 A. Yes, I am.

13 Q. And that was as part of the testimony that you
14 would have provided in Jagla as well as in Munoz?

15 MS. DANPULLO: Objection; asked and answered.

16 HEARING OFFICER LANGE: Just in terms of setting
17 things up, I think I'll have it answered.

18 A. Well, this wasn't a document that I offered to the
19 court. I believe it was produced either by defense counsel
20 in that case or by Dr. Emery, but I certainly read it at that
21 time and I heard it discussed in the testimony, and I may in
22 fact have answered questions about it if they were asked of
23 me.

24 Q. (BY MR. BIANCHI) And have you read that document
25 since your testimony?

1 A. Yes, I have.

2 Q. And in fact --

3 MR. BIANCHI: Well, we move to admit those last
4 exhibits that I had him identify with the exceptions --

5 HEARING OFFICER LANGE: They're already admitted.

6 MS. DANPULLO: Everything except the Clark-Munoz
7 transcript, I believe.

8 HEARING OFFICER LANGE: Is Clark-Munoz admitted?
9 Exhibit 50, is that admitted? In any point, it will be
10 admitted now if it hasn't been admitted already.

11 (DeMarre Exhibit No. 50 was admitted into
12 evidence.)

13 MR. BIANCHI: If we can get this marked.

14 HEARING OFFICER LANGE: I'm not going to make that
15 an exhibit. It's a decision --

16 MR. BIANCHI: Can I ask him some questions to
17 see --

18 HEARING OFFICER LANGE: Wait a minute. Let me
19 finish. I'm not going to mark it as an exhibit, but you
20 certainly can ask him some questions about it if he's
21 familiar with it.

22 MR. BIANCHI: I think it needs to be marked as an
23 exhibit for me to be able to have it referenced in the record
24 to be able for any future purposes, so I'm asking that it be
25 marked as an exhibit, and if you're not going to admit it,

1 that's fine, but it needs to be marked as an exhibit.

2 HEARING OFFICER LANGE: I think it's sufficient
3 that we refer to the citation.

4 MR. BIANCHI: I'm going to reference him to
5 specific pages and specific things within this that I need to
6 have this marked as an exhibit.

7 HEARING OFFICER LANGE: Can I see that?

8 MR. BIANCHI: (Handing).

9 MS. DANPULLO: Your Honor, just for the record, I'd
10 object to the admissibility of the statement or that it needs
11 to be marked. It's case law, and Dr. Logan isn't a legal
12 expert and doesn't profess to be.

13 HEARING OFFICER LANGE: Well, I'm not going to
14 admit it. I think the citation --

15 MR. BIANCHI: I'm just asking that it be marked at
16 this point. I'm not asking that it be admitted.

17 HEARING OFFICER LANGE: No, no. I don't think it's
18 appropriate that it be marked either. He can look at the
19 documents or he can look at the case. Keep in mind that he
20 is not a lawyer and I will not allow him to be asked about
21 legal issues, because that's beyond his ken.

22 Q. (BY MR. BIANCHI) Have you ever read the Jagla
23 opinion put out by the supreme court?

24 MS. DANPULLO: Objection, your Honor. I don't know
25 that there is a Jagla opinion.

1 Q. (BY MR. BIANCHI) Let's put it this way. Have you
2 ever read the opinion of the case out of the supreme court
3 City of Seattle versus Clark-Munoz versus Garrett Hall versus
4 Ted Jagla?

5 A. Yes, I have.

6 Q. Okay. So are you familiar with that rule?

7 A. Yes. Yes. To some extent.

8 Q. And in that ruling, don't they also cite as a basis
9 for the traceability standards for which the supreme court
10 was agreeing a web site which refers you directly to Exhibit
11 No. 46?

12 MS. DANPULLO: Objection; relevance.

13 HEARING OFFICER LANGE: Yes. I'd like to know the
14 relevance.

15 MR. BIANCHI: I'm setting up some background to
16 question him about Exhibit 46.

17 MS. DANPULLO: He's already indicated he's familiar
18 with 46. I don't believe we need any additional background.

19 HEARING OFFICER LANGE: I agree.

20 Q. (BY MR. BIANCHI) Part of your dealings as a state
21 toxicologist is to understand what the supreme court might
22 think would be important for purposes of traceability,
23 correct?

24 A. Yes.

25 Q. And in your opinion, didn't the supreme court -- in

1 reading the opinion of Jagla -- of that opinion, didn't the
2 supreme court reference as important material the web site
3 for which Exhibit 46 in your opinion?

4 A. I don't recall.

5 Q. In dealing with the DRTs, digital reference
6 thermometers, those are Eutechnics model 4300?

7 A. I don't recall the model number.

8 Q. They are Eutechnics?

9 A. I don't recall. I don't --

10 Q. Do you remember the brand name of them?

11 A. Well, they're purchased from Guth, and that's how
12 they've been referred to in the past.

13 Q. But you don't know the manufacturer of them?

14 A. I don't recall the manufacturer.

15 Q. Do you know the model number for them?

16 A. No. I don't recall that.

17 Q. Do the ICL Calibration Laboratories mention any
18 model number or manufacturer?

19 A. Yes. I believe they do.

20 Q. What model number is it that they reference?

21 HEARING OFFICER LANGE: The witness is looking at
22 Exhibit 6.

23 THE WITNESS: I'm looking at Exhibit 6. I beg your
24 pardon.

25 HEARING OFFICER LANGE: That's okay.

1 A. They reference -- instrument description says
2 inscription Guth Labs, Inc., model number 4300.

3 Q. So have you ever heard of Eutechnics model number
4 4300?

5 A. I recognize the brand name. I couldn't have told
6 you that that was who Guth bought these thermometers from
7 before they supplied them to us.

8 Q. Have you ever put in writing the approval of a
9 digital reference thermometer?

10 MS. DANPULLO: Objection; relevance.

11 HEARING OFFICER LANGE: Well, it does go to -- or,
12 no, it doesn't go to the issues before us.

13 MR. BIANCHI: I think it might go to his approval
14 process, his approval of thermometers process.

15 HEARING OFFICER LANGE: Well, there is nothing
16 that's ever said that he has to approve a digital reference
17 thermometer in either the statute or the WACs, so that's
18 really not before me.

19 MR. BIANCHI: I'd like to ask the question.

20 HEARING OFFICER LANGE: I don't think it's
21 appropriate in this hearing.

22 Q. (BY MR. BIANCHI) Prior to June 10, had you ever in
23 writing specifically stated that you had approved any
24 thermometer for use in the state of Washington?

25 A. No. Not as explicit -- not explicitly to the

1 extent that it was stated in the amended WAC.

2 Q. It was only in a roundabout way that you may have
3 said it?

4 A. Yeah. I think I felt that it was implicit in the
5 fact that the simulator had been approved and that the
6 thermometer was a component of the simulator.

7 Q. Now, part of the reason why you set up the DRT
8 program, the digital reference thermometer program for the
9 checking of the digital reference thermometer either through
10 initially Bosman or Guth or now ICL was to ensure there's no
11 errors associated with the mercury-in-glass thermometers such
12 as occurred back in the year 2000. Is that fair to say?

13 A. Yes.

14 Q. And in your passing WAC 448-13-035, the amended
15 one, the one that's in place now, the purpose of that is also
16 to make sure that -- well, hold on. Well, let me go back.
17 I'll strike the question and start over. How's that?

18 A. Okay.

19 Q. You approved a simulator thermometer certification
20 policy and protocol for the mercury-in-glass thermometer. Is
21 that fair to say?

22 A. Yes.

23 Q. And that's been reapproved by you just recently; is
24 that correct?

25 A. Yes. Yeah. It was first approved, I believe,

1 sometime in 2000 and subsequently been reapproved every time
2 the manual has been updated.

3 Q. And that's -- and basically it reads the same as to
4 what the state patrol breath test section is to do with
5 mercury-in-glass thermometers, checking them on an annual
6 basis, correct?

7 A. Yes.

8 Q. And that policy and procedure is also to be
9 employed as it relates to all mercury-in-glass thermometers
10 that are used for purposes of quality assurance and to be
11 done at least once a year also, correct?

12 A. Yes.

13 Q. Now, prior to your filling out any documents such
14 as -- well, let's go back to the beginning. How's that?

15 Now, Exhibit No. -- I'm going to direct your
16 attention to Exhibit No. 2 and Exhibit No. 3, okay? Now,
17 Exhibit No. 2 does not deal with whether or not the
18 mercury-in-glass thermometers that are used in simulators for
19 QAP have been tested against the NIST traceable thermometer,
20 correct?

21 MS. DANPULLO: Objection; relevance.

22 HEARING OFFICER LANGE: I agree. It's not
23 relevant. The 448-13-035 says that the MIGs will be checked
24 by a DRT, digital reference thermometer which is traceable to
25 NIST.

1 Q. (BY MR. BIANCHI) Does that document deal with the
2 testing or the proof of the testing of the mercury-in-glass
3 thermometers in the QAP simulators?

4 MS. DANPULLO: I'm sorry. The QAP simulators? I'm
5 not familiar with that term.

6 Q. (BY MR. BIANCII) Or the assurance procedure
7 simulators.

8 A. No.

9 Q. How about the other exhibit, Exhibit No. 3, is it?
10 Does that deal with the testing of the mercury-in-glass
11 thermometers that are used in simulators for quality
12 assurance procedures?

13 A. That wasn't my understanding of the intent of this
14 declaration. It was referenced to the field -- the
15 thermometers used in the field instruments.

16 Q. But part of your policies and procedures is that
17 the mercury-in-glass thermometers that are used in the
18 quality assurance procedure need to be checked on an annual
19 basis, correct?

20 MS. DANPULLO: Again, I object to relevance to this
21 line of questioning.

22 HEARING OFFICER LANGE: This one I do think is
23 relevant to what we're doing here, so I'm going to overrule
24 that.

25 A. Yes.

1 Q. (BY MR. BIANCHI) Now, when the Washington State
2 Patrol breath test section receives -- well, did you create
3 any policies and procedures for the Washington State Patrol
4 breath test section to keep records of repeatability or
5 verification as relates to the individual digital reference
6 thermometer that they use?

7 HEARING OFFICER LANGE: I don't understand.

8 Q. (BY MR. BIANCHI) In your policies and procedures
9 manual, you have -- there is approved by you recordkeeping as
10 to the accuracy of the mercury-in-glass thermometers,
11 correct?

12 A. Yes.

13 Q. Is there any policy or procedure by which the state
14 patrol breath test section is to keep records of the digital
15 reference thermometer?

16 MS. DANPULLO: Do you understand the question,
17 Dr. Logan?

18 THE WITNESS: No, I don't.

19 Q. (BY MR. BIANCHI) Have you put anything in writing
20 to the state patrol breath test section to say keep certain
21 records as relates to the digital reference thermometer?

22 HEARING OFFICER LANGE: What kind of records?

23 MR. BIANCHI: I'm just saying anything. Has he
24 written any protocol or told them to keep any records of the
25 digital reference thermometer?

1 A. I don't recall how explicit the directions if there
2 are explicit directions in the policy and procedures manual
3 to that effect. I mean, as a matter of course and a matter
4 of business, these certifications -- the calibration
5 certifications of the digital reference thermometers are
6 maintained by the breath test section.

7 Q. (BY MR. BIANCHI) And when you're referring to these
8 records, again, for this record's purposes, you're referring
9 to the ICL documents, which are Exhibits 6 through --

10 A. 41.

11 Q. 6 through 41, okay. But prior to today's date,
12 have you reviewed any records of the state patrol breath test
13 section in which they attempt to verify the accuracy of the
14 digital reference thermometer?

15 HEARING OFFICER LANGE: You mean independent of
16 ICL?

17 MR. BIANCHI: Independent of ICL.

18 A. Independent of ICL, no.

19 Q. (BY MR. BIANCHI) Have you seen any records in which
20 they attempt to calibrate the digital reference thermometer?

21 HEARING OFFICER LANGE: Who is they?

22 MS. DANPULLO: Object to relevance.

23 MR. BIANCHI: The Washington State Patrol breath
24 test section.

25 MS. DANPULLO: Relevance.

1 HEARING OFFICER LANGE: No. That's not relevant.

2 MR. BIANCHI: I'll tie it in with the exhibit in a
3 minute. Just give me three more questions, okay?

4 Q. (BY MR. BIANCHI) To your knowledge, does the state
5 patrol breath test section in any manner certify the digital
6 reference thermometer?

7 HEARING OFFICER LANGE: That is not relevant to
8 what we do here.

9 MR. BIANCHI: Okay. Just a second.

10 Q. (BY MR. BIANCHI) Would you agree with me that the
11 Washington State Patrol breath test section is the user of
12 the digital reference thermometer?

13 A. Yes.

14 Q. Okay. I want to direct your attention now to
15 Exhibit No. 46, okay? In that document -- I want to make
16 sure we're on the same page.

17 MS. GREGG: Let's give the title to the document
18 too.

19 Q. (BY MR. BIANCHI) It's called Supplementary
20 Materials up on top. Is that correct, Dr. Logan?

21 A. Yes. It has Supplementary Materials -
22 Traceability.

23 Q. I want to direct your attention to the definition
24 of key terms and statement of policy.

25 A. Okay. Which page is that on?

1 Q. Well, it would be -- just keep going through it.
2 There it is. Okay. In there, don't they have a
3 definition --

4 HEARING OFFICER LANGE: Okay. What page are we
5 referencing here?

6 MS. DANPULLO: It's the third page.

7 MS. GREGG: Actually, is it the third page? Are
8 they numbered on the bottom?

9 MR. BIANCHI: No. He's looking at a different
10 exhibit than you are right now. He's looking at 44.

11 THE WITNESS: I'm looking at Exhibit 46.

12 MS. GREGG: So where are we looking at, 46 or 44?

13 MR. BIANCHI: 46.

14 MS. DANPULLO: And if you turn the third page in.

15 MR. BIANCHI: This was supplied by Diego Vargas, I
16 think.

17 HEARING OFFICER LANGE: I understand that, and
18 that's what I'm looking for.

19 MR. BIANCHI: You're looking in my materials.

20 MS. GREGG: My notes have 46 as the NIST frequently
21 asked questions. Is that --

22 MS. DANPULLO: That's correct. That's the same
23 thing.

24 HEARING OFFICER LANGE: Wait a minute. The one
25 with this particular page?

1 MR. BIANCHI: No.

2 MS. DANPULLO: It's the frequently asked questions
3 is the front page. Here. Is this one?

4 MR. BIANCHI: Yeah.

5 HEARING OFFICER LANGE: Here we go. I got it.

6 Q. (BY MR. BIANCHI) In there, they give certain
7 definitions. Is that fair to say under the definition
8 section?

9 A. The first section deals with definitions, yes.

10 Q. And in there they use the term user of result or
11 value, correct?

12 A. Yes.

13 Q. And in that, wouldn't you agree that the user of
14 the result or the value would be the Washington State Patrol
15 breath test section by this definition?

16 A. Yes.

17 MS. DANPULLO: Objection as to relevance.

18 HEARING OFFICER LANGE: I'm going to overrule that.

19 Q. (BY MR. BIANCHI) Now, also in here, don't they
20 define assuring traceability as meaning that -- meaning to
21 provide support for the claim of traceability the result of a
22 given measurement or value of the standard?

23 A. Yes.

24 Q. Now, also I want to direct your attention now to
25 what would be approximately -- it's still in frequently asked

1 questions, and if we could go to section 5 where it states,
2 "What do I need to do to support a claim of traceability?"

3 A. I see that.

4 Q. First of all, let's go to number 6, okay? In that,
5 don't they say, "Who is responsible for assessing the
6 validity of claims of traceability?"

7 A. Yes, they do.

8 Q. And in that, don't they say that the user of the
9 result of the measurement is responsible for assessing the
10 validity of claims of traceability?

11 A. Yes, they do.

12 Q. So in essence, they're saying by this that the
13 Washington State Patrol breath test section is responsible
14 for assessing the validity of a claim of traceability?

15 MS. DANPULLO: Objection as to form of the
16 question. Also this document has already been admitted, so
17 there's no reason for us to go through and have Mr. Bianchi
18 read the question -- read all the information in here and ask
19 Dr. Logan if that's what it says. It's been admitted. The
20 hearing officer can read it for themselves.

21 Q. (BY MR. BIANCHI) Let me put it this way. Would you
22 agree with me that by reading section 6 that the NIST policy
23 is that the Washington State Patrol breath test section is
24 responsible for assessing the validity of the claim of
25 traceability?

1 HEARING OFFICER LANGE: Well, I don't think that
2 that's really accurate. That's again a summary --

3 MR. BIANCHI: I'm asking him a question.

4 HEARING OFFICER LANGE: Again, I get to make the
5 decision on whether it's relevant or not to a portion of the
6 hearing, and I don't think it is. This is NIST. He's not an
7 expert on NIST. He's not a metrologist. He's the breath
8 test -- he's a state toxicologist.

9 Q. (BY MR. BIANCHI) Would you agree with me that NIST
10 sets the standards for traceability as it deals with
11 thermometry?

12 A. They set the standards for traceability to NIST.

13 Q. For the thermometers?

14 MS. DANPULLO: Objection; asked and answered.

15 HEARING OFFICER LANGE: Agreed.

16 Q. (BY MR. BIANCHI) So, now, I want to direct your
17 attention to questions about establishing traceability,
18 section B, which would be probably about the next page, okay?

19 A. Yes.

20 Q. Well, let's go back one before that. Item 7 under
21 frequently asked questions, have you read that before?

22 A. Yes.

23 Q. And you're familiar with that?

24 A. Yes.

25 Q. In that, don't they also say a checklist for

1 supporting a claim of traceability through calibration?

2 MS. DANPULLO: Objection. Your Honor, again,
3 Mr. Bianchi is just reading the document. The hearings
4 officer can read the document. There's no reason for
5 Dr. Logan to answer whether or not that's contained in the
6 document.

7 HEARING OFFICER LANGE: I agree.

8 Q. (BY MR. BIANCHI) Does the state patrol breath test
9 section have a checklist for supporting a claim of
10 traceability through calibration?

11 A. Does the breath test section have a checklist?

12 Q. Yes.

13 A. Not that I'm aware of, no.

14 Q. Does the breath test section have a measurement
15 assurance program as it relates to digital reference
16 thermometers?

17 MS. DANPULLO: Objection; relevance.

18 HEARING OFFICER LANGE: It isn't relevant. I think
19 I want to ask a question in here that might cut to the chase.
20 Dr. Logan, do you recall in the Jagla testimony -- you said
21 you reviewed the Jagla testimony. Do you recall Dr. Emery
22 saying that the way to establish traceability is to get the
23 documents from the ICL Lab?

24 THE WITNESS: Yes.

25 HEARING OFFICER LANGE: Mr. Bianchi.

1 Q. (BY MR. BIANCHI) I want to direct your attention to
2 section VI, Checklist for Traceability Through Calibration,
3 the same exhibit we've been dealing with.

4 A. Section 6?

5 Q. Yes. Roman numeral VI. It would be probably the
6 last three pages. I'd ask you to read those -- read the
7 elements 1, 2, 3, and 4 to yourself first, please.

8 HEARING OFFICER LANGE: Okay. Before we get
9 through this, I'd like to know what relevance this has to the
10 level we're dealing with.

11 MR. BIANCHI: It has to do with what is and what is
12 not traceable and what he's relied upon for saying something
13 is traceable.

14 MS. DANPULLO: I'm sorry, your Honor. My document
15 doesn't have the additional information that Dr. Logan is
16 supposed to be looking at now.

17 HEARING OFFICER LANGE: The checklist for
18 traceability through calibration?

19 MS. DANPULLO: Yes. I don't have that.

20 HEARING OFFICER LANGE: Do you want to come and
21 look at mine?

22 MS. DANPULLO: Yes. Thank you, your Honor.

23 A. I've reviewed that.

24 Q. (BY MR. BIANCHI) To your knowledge, does the state
25 patrol breath test section have a measurement assurance

1 program as listed in element 1 on the checklist for
2 traceability through calibration?

3 MS. DANPULLO: Again, I would object to relevance.

4 HEARING OFFICER LANGE: I agree. It's not
5 relevant.

6 MR. BIANCHI: I'd still ask that he be --

7 Q. (BY MR. BIANCHI) This has to deal with -- isn't
8 this a checklist put out by NIST for traceability through
9 calibration, Dr. Logan?

10 A. That's what it says.

11 Q. Okay. And isn't this also attached to what is to
12 be done for traceability by NIST?

13 HEARING OFFICER LANGE: Well, that's already been
14 asked and answered a couple times, so let's move on. Let's
15 not get argumentative.

16 Q. (BY MR. BIANCHI) Isn't a checklist for traceability
17 through calibration -- well, does the state patrol breath
18 test section establish appropriate values and uncertainties
19 to use with newly calibrated instruments modifying and
20 annotating the control charts accordingly but continuing the
21 measurement assurance program?

22 MS. DANPULLO: Again, I'd object to relevance, your
23 Honor. If you look at the supplementary materials, Exhibit
24 No. 46, at the top it's just indicated that this is just a
25 resource for NIST customers. There's nothing to indicate

1 that in order to be traceable to NIST that any of these
2 things have to be done.

3 HEARING OFFICER LANGE: And I agree with you, and,
4 in fact, I think Dr. Emery in -- I can't remember if it was
5 Clark-Munoz or the second session of Jagla did make that
6 statement that these are recommendations but it's not a
7 requirement. So I don't think it is relevant to what we're
8 doing here today.

9 Q. (BY MR. BIANCHI) I would ask you, then, Dr. Logan,
10 is that same checklist, the same checklist, which is the last
11 page of the exhibit out of the Jagla dealing with
12 supplementary materials, the same checklist?

13 A. It appears to be, yes.

14 Q. So you were familiar with the checklist for
15 traceability prior to today's date?

16 A. Yes. I've seen that before.

17 Q. But as far as you know, no one's implemented any
18 type of checklist for traceability --

19 MS. DANPULLO: Objection; asked and answered.

20 HEARING OFFICER LANGE: I agree. It's been asked
21 and answered.

22 MR. BIANCHI: It's never been answered. I never
23 asked that question.

24 MS. DANPULLO: About the checklist?

25 MR. BIANCHI: I never asked if he has the

1 checklist.

2 HEARING OFFICER LANGE: Wait a minute. Wait a
3 minute. One at a time. So, Mr. Bianchi, you said what?

4 Q. (BY MR. BIANCHI) To your knowledge, has the state
5 patrol breath test section ever implemented a checklist for
6 traceability through calibration?

7 MS. DANPULLO: And my objection is asked and
8 answered. He asked that before he went back to the document.

9 HEARING OFFICER LANGE: I agree. You did ask it,
10 and it was answered.

11 Q. (BY MR. BIANCHI) What testing, if any, does the
12 state patrol breath test section do of the digital reference
13 thermometer?

14 A. Well, the digital reference thermometer is our
15 primary thermometer standards.

16 Q. I understand that. The question is what testing
17 does the state patrol breath test section --

18 MS. DANPULLO: Objection, your Honor --

19 HEARING OFFICER LANGE: Wait a minute.

20 MR. BIANCHI: I'd ask you to direct him to answer
21 the question.

22 HEARING OFFICER LANGE: I didn't get to hear the
23 complete objection first of all. I got another question over
24 it, so --

25 MR. BIANCHI: Why don't I start over.

1 Q. (BY MR. BIANCHI) What testing does the state patrol
2 breath test section do of the digital reference thermometer?

3 A. It does no independent testing of the certified
4 digital reference thermometer.

5 Q. Okay. Thank you. I want to direct your attention
6 to what would be consistent on Exhibits 6 through 41 as well
7 as the exhibits which -- I think 6 through 41 and also the
8 original one of these documents dealing with ICL. You said
9 you've read most of those in the past and you rely upon
10 representations by ICL?

11 A. I've read many of them, yes.

12 Q. In dealing with these, have you ever -- if you
13 could put one in front of you for a moment, please. For the
14 record, please indicate what exhibit you're referring to.

15 A. This is Exhibit No. 6.

16 Q. And in this exhibit, part of what you're relying
17 upon is representations by ICL that they've done certain
18 things. Would that be fair to say?

19 MS. DANPULLO: Objection; asked and answered.

20 HEARING OFFICER LANGE: Agreed. This was dealt
21 with by Mr. Smith.

22 MR. SMITH: Well, let me just state for the record
23 that in order to set up the parameters of his questions, he's
24 got to at least get some foundation issues about the exhibit
25 again. That doesn't mean he's going to go through it in

1 detail, but he can't just start asking questions in a vacuum
2 without establishing the basis of the knowledge of the
3 exhibit.

4 HEARING OFFICER LANGE: Well, he's got the exhibit
5 in front of him, so he can ask specific questions about the
6 exhibit if he wants to ask a question, but it shouldn't
7 repeat what we've already done.

8 Q. (BY MR. BIANCHI) Have you ever looked or seen -- I
9 want to direct your attention to the first page of that
10 document.

11 A. Of Exhibit 6?

12 Q. Yeah. The ICL. Underneath the report of test for
13 digital thermometer, which is in a bold kind of bigger
14 font --

15 A. Yes.

16 Q. In there it says that -- it starts off, "This is to
17 certify that the instrument described below." Are we all in
18 the same area?

19 A. Yes.

20 Q. In there, doesn't it say that in accordance with --
21 the third sentence down, "In accordance with ICL's ISO/IEC
22 17025 calibration procedure referenced below"? Do you see
23 that?

24 A. Yes. I see that.

25 Q. Have you ever read ISO/IEC 17025 calibration

1 procedure?

2 A. No.

3 Q. It goes on to say that "this calibration meets the
4 requirements of ISO/IEC 17025." Have you ever read ISO/IEC
5 17025?

6 A. No.

7 MS. DANPULLO: Objection; relevance.

8 HEARING OFFICER LANGE: Again, it isn't relevant.
9 He said he relied on it and --

10 MR. BIANCHI: If I can finish just to show that his
11 reliance is wrong just by going into this.

12 HEARING OFFICER LANGE: Well, he's already said
13 that he hasn't read the two documents that you've mentioned,
14 so I don't think that -- he's not going to be able to speak
15 to --

16 MR. BIANCHI: He's also said that if something were
17 misrepresented by ICL, that would put in jeopardy his
18 reliance upon the document.

19 HEARING OFFICER LANGE: All right.

20 MR. BIANCHI: So I need to ask him some questions
21 to show that this is in jeopardy, okay?

22 HEARING OFFICER LANGE: Okay. And how is that
23 going to be accomplished by looking at the ICL document?

24 MR. BIANCHI: Let me finish with these other ones
25 and two more and then there will be three questions, okay,

1 and it will be set up.

2 HEARING OFFICER LANGE: All right.

3 Q. (BY MR. BIANCHI) Have you ever read ANSI/NCSL
4 Z540-1-1994?

5 A. No.

6 Q. Have you ever read MIL-STD 45662A?

7 A. No.

8 Q. I want to direct your attention to Exhibit No. 49
9 and down --

10 HEARING OFFICER LANGE: Wait a minute. Wait a
11 minute. And that's Jagla 2? Is that Jagla 2?

12 MR. BIANCHI: I guess, yeah.

13 Q. (BY MR. BIANCHI) If you could put Exhibit No. 49 in
14 front of you. It's with a red rubber band around it to your
15 left there. I want to direct your attention to the paginated
16 section number 494 and 495.

17 MS. DANPULLO: Just for the record, is that an
18 exhibit in the transcript or is that --

19 MR. BIANCHI: It's been admitted as an exhibit.

20 HEARING OFFICER LANGE: It is not a part that I
21 will be excluding. Wait a minute. Was this part of the
22 original hearing?

23 MR. BIANCHI: No.

24 HEARING OFFICER LANGE: Okay. So then it should
25 not be part of 49 if it's not part of the hearing, because

1 that's what I understood 49 was.

2 MR. BIANCHI: Starting from pagination of Exhibit
3 49, starting from pagination number 462 were documents I
4 submitted for purposes of this hearing in addition to Jagla.

5 HEARING OFFICER LANGE: Okay. All right. So I
6 didn't understand that. I thought that these -- from what
7 you said that these were all attachments to the Jagla
8 hearing.

9 MR. BIANCHI: No. I just said that this included
10 Jagla, but these are additional documents.

11 HEARING OFFICER LANGE: Well, I didn't understand
12 that, so these should actually be marked independently. So
13 pages 462 to 529 are not going to be part of Exhibit 49. And
14 you're referencing which pages now?

15 MR. BIANCHI: Page 494 and 495.

16 HEARING OFFICER LANGE: Have you seen that,
17 Counsel?

18 MS. DANPULLO: No, I haven't.

19 HEARING OFFICER LANGE: We'll mark that as 52.
20 That's a one-page document?

21 MR. BIANCHI: There's two.

22 MS. DANPULLO: I'd object to the admissibility of
23 those documents to the relevance.

24 HEARING OFFICER LANGE: The basis? You said
25 relevance. Any other objections?

1 MS. DANPULLO: No, your Honor.

2 HEARING OFFICER LANGE: I don't know what they are.
3 These are military standards.

4 MR. BIANCHI: That's what's listed in ICL as what
5 they do.

6 HEARING OFFICER LANGE: Wait a minute. Well, this
7 is a different one than the ISO and the ANCI that you
8 referenced earlier, am I correct?

9 MR. BIANCHI: No. He already testified that he has
10 never read MIL-STD 45662A and that that's referenced in the
11 ICL.

12 HEARING OFFICER LANGE: Okay.

13 MR. BIANCHI: Now I'd like to go to these other two
14 exhibits.

15 HEARING OFFICER LANGE: Okay.

16 Q. (BY MR. BIANCHI) Dr. Logan, doesn't it appear by
17 what's now been marked for exhibit purposes --

18 MR. BIANCHI: What are they?

19 HEARING OFFICER LANGE: It's now 52.

20 (DeMarre Exhibit No. 52 was marked for
21 identification.)

22 Q. (BY MR. BIANCHI) Does it now not appear through
23 Exhibits 51 and 52 --

24 HEARING OFFICER LANGE: No. I thought those were
25 one exhibit. Didn't you say the two pages of the one

1 exhibit?

2 MR. BIANCHI: That's fine.

3 Q. (BY MR. BIANCHI) Looking at Exhibit 52, which is
4 two pages, okay?

5 A. Yes.

6 Q. Does it appear to you on reviewing those documents
7 that the MIL-STD 45662A was cancelled in 1995?

8 A. Yes.

9 Q. And isn't that what ICL Laboratories in their
10 preamble says that they're meeting the standards of?

11 A. That's one of several documents they say they meet
12 the standards of, yes.

13 Q. Now, I want to also direct your attention back to
14 the ICL document if we can, please, the No. 6, I think. Have
15 you ever looked at QS 9000 series of quality standards?

16 A. No.

17 MR. BIANCHI: If we could possibly pull out the
18 paginated 484 through 486.

19 HEARING OFFICER LANGE: Okay. I've got that.
20 We'll mark this as 54.

21 (DeMarre Exhibit No. 53 was marked for
22 identification.)

23 Q. (BY MR. BIANCHI) Directing your attention to page 2
24 of this document. Does this appear to be a document dealing
25 with QS 9000?

1 A. That's what it appears to be, although I've never
2 seen this before and it's cut off down on the right-hand side
3 of the page, so it makes it difficult to understand. It's
4 not a complete document.

5 Q. On the second page under applicability, does this
6 document seem to suggest that QS 9000 applies to all internal
7 and external supplier of production materials, service parts,
8 or heat treating, painting, plating, or other finishing
9 services?

10 MS. DANPULLO: Objection, your Honor. I don't know
11 the relevance of this document, and also it's not a complete
12 document. As Dr. Logan's indicated, it's cut off down the
13 side, and we would object to the use of this document.

14 HEARING OFFICER LANGE: I agree. Given the
15 limitations that the Doctor's already identified, I don't
16 think that he can draw anything meaningful from this without
17 speculating. I'm not going to have him speculating about a
18 document that he has never seen before and is not familiar
19 with, and I don't think --

20 Q. (BY MR. BIANCHI) Does it appear by reading the
21 first sentence of the beginning of this that this is
22 something developed by the big three, Ford, GM, and Chrysler,
23 to supply quality parts to their dealership?

24 HEARING OFFICER LANGE: Again, this is speculation.
25 When you say this appears to be, we don't know. We don't

1 know what it is, and if we don't have a complete document as
2 Dr. Logan has already said we don't have, we don't know
3 what's missing. We don't know what qualifications on the
4 statements are there, so I think it's not appropriate that we
5 inquire further on an incomplete document.

6 MR. BIANCHI: I would suggest that that goes
7 completely to Dr. Logan's ability to give an opinion as to
8 whether or not something meets NIST qualifications or
9 requirements or not because he doesn't know what it is
10 they're supposed to do, he's never read the information,
11 they're dealing with military standards that have been
12 cancelled since 1995, and he's not even aware of that.

13 That goes to whether or not he should even be able
14 to express an opinion that someone is -- that someone else, a
15 third entity that he's never seen, talked with, or
16 corresponded with, is properly giving an opinion that they
17 meet NIST when he doesn't know what they do and he's never
18 researched it. That is the whole bottom line here.

19 So I should be able to cross-examine him on these
20 things because he said he's never looked at them, and we
21 don't know what applies and what doesn't apply. He said that
22 if there's a misrepresentation in the ICL documents it would
23 take away from his ability to say whether or not they are
24 truly traceable, and here now we have the documents which
25 suggest that they're not there and you won't let me get into

1 them.

2 HEARING OFFICER LANGE: Counsel.

3 MS. DANPULLO: First of all, most of that is
4 argument, and I'd ask that it be stricken. As far as the
5 relevancy to this, I think that he's already been able to
6 inquire into the military standards that's been revoked.
7 This document doesn't have relevance. It's not a complete
8 document, and it's not appropriate for admissibility at this
9 point, especially when it's not a complete document.

10 Furthermore, Dr. -- I think that there's been a
11 mischaracterization of Dr. Logan's testimony regarding his
12 reliance on the ICL Lab report, and he's already indicated
13 that he hadn't read all the documents that ICL Lab has
14 referred to, so unless there's further documentation as to
15 other policies or procedures or references that ICL Lab that
16 have been cancelled, then I don't believe any further inquiry
17 into this is appropriate.

18 HEARING OFFICER LANGE: I am going to sustain the
19 objection, because I don't think it's appropriate because
20 given what Dr. Logan has testified about in terms of what he
21 did in connection with ICL, and this further inquiry is
22 beyond what this witness can know.

23 MR. BIANCHI: So you're saying the witness cannot
24 know whether somebody has followed NIST or not?

25 HEARING OFFICER LANGE: The witness will not be

1 asked about this particular document because it's not
2 relevant to the issues before me.

3 MR. BIANCHI: Then I'd move to strike his opinion
4 that they followed NIST, then, because he has no basis to
5 give that opinion because of your limiting our
6 cross-examination and the fact that he says he doesn't know
7 what they do.

8 HEARING OFFICER LANGE: That's denied, because I
9 think that in terms of the issues that are before me, you
10 have been afforded adequate opportunity and you've also asked
11 whether he's reviewed certain documents, and the specifics of
12 it I think we don't need to get into that any further.

13 MR. BIANCHI: Then I would ask if that's the same
14 ruling from -- that's going to apply in my cases from Hearing
15 Officer Marjorie Gregg as well as Ellen Barton, if they are
16 ruling the same way.

17 HEARING OFFICER LANGE: I think I'm the one that's
18 handling the objections, so it will be, yeah.

19 MR. BIANCHI: I didn't realize that you were --
20 never mind. Strike that.

21 Q. (BY MR. BIANCHI) Have you been advised by Sergeant
22 Gullberg prior to today's testimony that there was some
23 concerns about some representations made by ICL that they
24 might have been cancelled or didn't apply, some of the
25 representations in these documentations?

1 A. Yes.

2 Q. So that was a concern of Sergeant Gullberg that he
3 had represented to you prior to your testimony today,
4 correct?

5 MS. DANPULLO: Object as to characterization.

6 MR. BIANCHI: Strike that. I'll take the question
7 back.

8 HEARING OFFICER LANGE: Thank you.

9 MR. BIANCHI: I have no further questions.

10 HEARING OFFICER LANGE: Okay. Ms. DanPullo.

11 FURTHER EXAMINATION

12 BY MS. DANPULLO:

13 Q. In regards to counsel's last question with regards
14 to what Sergeant Gullberg discussed with you about some of
15 the treatises or some of the reliance material being
16 cancelled, can you tell us what he told you?

17 MR. BIANCHI: Hearsay. Objection.

18 HEARING OFFICER LANGE: Overruled. Hearsay is
19 allowable in these civil proceedings.

20 A. Sergeant Gullberg indicated to me that Mr. Bianchi
21 had brought up the previous venue the fact that MIL standard
22 45662A had been cancelled in 1995 and superceded by a new
23 standard ISO 100121 and indicated to me that current reports
24 from ICL Laboratories indicate that in fact the MIL standard
25 had been superceded by the ISO standard and that they were in

1 compliance with that standard.

2 Q. (BY MS. DANPULLO) Knowing that on their lab reports
3 or their report of calibration they had the cancelled
4 military standard or what's been referred to as Exhibit 52,
5 did that cause you concern or did that make you believe that
6 their reports were not sufficient to trace back to the
7 standards of NIST?

8 A. No.

9 MS. DANPULLO: I have no further questions.

10 HEARING OFFICER LANGE: Any follow-up, Mr. Bianchi?

11 MR. BIANCHI: Hold on a second.

12 FURTHER EXAMINATION

13 BY MR. BIANCHI:

14 Q. Any of the document -- to make it easier possibly
15 -- well, let's go back to Exhibit 6, the ICL documentation,
16 okay, that you have in front of you.

17 A. Yes.

18 Q. About where it says calibration procedure used --

19 A. Yes.

20 Q. -- I take it by previous testimony you have not
21 reviewed procedure 4 to see how it is drawn from the ASTM
22 E77, E220, or E563?

23 A. That's correct.

24 Q. I take it that going down under below results of
25 calibration that says no adjustments were made to this

1 instrument or -- what does it say on that one?

2 A. Yes. That's what it says.

3 Q. It starts with a paragraph that says our
4 calibration system, okay?

5 A. Yes.

6 Q. In there approximately the one, two, three, four,
7 it mentions -- third sentence down says, "These uncertainties
8 have been calculated utilizing the methods elaborated in NIST
9 technical note 1297 and the ANSI-NCSL document Z-540-2." Do
10 you see that?

11 A. I see that.

12 Q. Have you read either one of those documents?

13 MS. DANPULLO: Objection; beyond the scope of the
14 cross.

15 HEARING OFFICER LANGE: And, besides, he's already
16 indicated he's reviewed ANSI technical 1297. I'm going to
17 allow him some latitude because this is a civil hearing and
18 it's a fact finding for me, so even if it is beyond the scope
19 of cross, I'd rather know. I'm not sure about the ANCI-NCSL
20 document. I don't recall him saying that he reviewed that.
21 Wait. Okay. The objection is overruled.

22 Q. (BY MR. BIANCHI) Have you reviewed either one of
23 those documents to your knowledge?

24 A. I've reviewed technical note 1297 and I have seen
25 the second document. I haven't spent any time reviewing it

1 in any detail.

2 Q. Now, down at the bottom they talk about important
3 note at the bottom of this.

4 A. Yes.

5 Q. Page 1 of 2.

6 A. Yes.

7 Q. In there, did you read the part where it says,
8 "Accordingly, ICL Laboratories, Inc., represents that the
9 values indicated above were those observed during the
10 performance of this test, however, cannot be responsible for
11 inaccurate readings which may be experienced in future uses
12 due to conditions which are beyond our control"?

13 MS. DANPULLO: Objection; relevance.

14 A. Yes. I see that.

15 HEARING OFFICER LANGE: And the objection is
16 overruled anyway.

17 Q. (BY MR. BIANCHI) Let me check one thing just to
18 make sure. At the end of page 2, would you consider yourself
19 as the state toxicologist in charge of breath testing with a
20 subdivision being in delegation to the state patrol breath
21 test section the user of the digital reference thermometer,
22 those entities?

23 HEARING OFFICER LANGE: In what capacity are you
24 talking about? Are you talking in terms of NIST or --

25 MR. BIANCHI: In terms of NIST, yeah.

1 A. I'm sorry. Were you referring me to a section in
2 here?

3 Q. (BY MR. BIANCHI) No. First of all I'm just asking
4 a question. Would you consider the state patrol breath test
5 section for which you are the head the user of the digital
6 reference thermometers per NIST definition?

7 A. Yes, I would.

8 Q. On page 2 of 2 of this last exhibit, I believe it's
9 Exhibit 6, don't the -- doesn't ICL say that the user should
10 be aware that any number of factors may cause this instrument
11 to drift out of calibration before the specified calibration
12 interval has expired?

13 A. Yes.

14 Q. What causes it to drift out of calibration before
15 the specified calibration interval is expired that ICL has
16 told you?

17 MS. DANPULLO: Objection; relevance.

18 HEARING OFFICER LANGE: Agreed. It's not relevant.
19 It's also beyond -- he's not the metrologist or the ICL
20 person, and he said already that he has a limited
21 understanding of what ICL does or how it does it. He relied
22 on them as an accredited lab that he got from input partially
23 from Dr. Emery, and I think this is beyond what he can
24 testify to, so I am not going to ask him to answer that
25 question.

1 Q. (BY MR. BIANCHI) I want to go back to page 1 again
2 if we can and again to the important note, the part that says
3 important note. Okay?

4 A. Yes.

5 Q. If I could ask -- it's about one, two, three, four,
6 five, six, seven lines. I'd ask if you could read that to
7 yourself for a moment, please.

8 A. I've read it.

9 Q. In there, don't they indicate that "the correct
10 temperature indication may be impeded by physical damage to
11 the probe or cable assembly"?

12 A. Yes.

13 MR. BIANCHI: I have no further questions.

14 HEARING OFFICER LANGE: Ms. DanPullo, any
15 follow-up?

16 FURTHER EXAMINATION

17 BY MS. DANPULLO:

18 Q. On this same report, it does give you a
19 recommendation of when you should have it recalibrated,
20 correct?

21 A. Yes.

22 Q. And when is that?

23 A. Yearly.

24 Q. And are you familiar with how often the breath test
25 program currently has them recalibrated or recertified?

1 A. Yes.

2 Q. And I'm sorry. Is there a difference between
3 recalibration and recertification?

4 A. The process is recertification. If in the process
5 of recertifying it failed to certify, it would be
6 recalibrated before it was returned to the breath test
7 section.

8 Q. Thank you. And when you have -- are you familiar
9 with how often you have them recertified, your digital
10 reference thermometers?

11 A. Yes.

12 Q. And how often is that?

13 A. We send them back there each -- every six months.

14 Q. Even though they're recommending to do it once a
15 year?

16 A. Yes. And that was a result of a discussion that
17 Sergeant Gullberg and I had about monitoring the stability of
18 the digital reference thermometers.

19 Q. And what effect does the digital reference
20 thermometer have on the accuracy of the breath test?

21 A. It is not a part of the breath test itself. It has
22 no measurable input in terms of the instrument's ability to
23 measure alcohol.

24 Q. And if the simulator solution didn't read within
25 the certain prescribed limits, wouldn't that stop the breath

1 test from giving an accurate breath test ticket?

2 A. It would prevent it from producing a valid breath
3 test ticket if it fell outside of the 072 to 088 required
4 range.

5 Q. And you would know that it fell outside that range
6 based upon the breath test ticket; is that correct?

7 A. Yes.

8 Q. So there's other precautions to make sure that
9 there's an accurate result besides a digital reference
10 thermometer; is that correct?

11 A. Yes. A variability of a tenth of a degree in the
12 temperature of a simulator solution, which is far in excess
13 of what all of these documents 6 through 44 indicate is the
14 capability of that digital reference thermometer, would
15 produce a change in the alcohol reading from the simulator in
16 the fourth decimal place.

17 The instrument only measures to three decimal
18 places, so even a tenth of a degree variability would not
19 produce any measurable difference in the instrument, so it's
20 well in excess of what is required in order to ensure
21 accurate and reliable results from the DataMaster.

22 Q. Thank you. I have no further questions.

23 HEARING OFFICER LANGE: I have just a couple unless
24 you have anything else.

25 MR. BIANCHI: Not at this point.

1 MR. SMITH: I have a couple follow-up questions.

2 HEARING OFFICER LANGE: Why don't I do it and that
3 might make it more efficient.

4 EXAMINATION

5 BY HEARING OFFICER LANGE:

6 Q. You were asked about using -- or that you became
7 aware that digital reference thermometers were being used in
8 simulators at one point; is that correct?

9 A. Well, what I testified to was that the breath test
10 section at one point received -- with an order of
11 DataMaster's they received a Guth simulator, which was not
12 the 34C. It was a Guth model 2100. Some of those were put
13 in the field. I believe two of them were put in the field
14 without my approval. When I found out that they had been put
15 in the field, I had them removed from the field.

16 Q. Do you recall when that was?

17 A. I don't.

18 Q. Was it before 2003?

19 A. Yes.

20 Q. Now, the procedure you are using now in terms of
21 certifying the digital reference thermometer, is that
22 consistent with your understanding of Dr. Emery's exposition
23 on traceability?

24 A. Yes.

25 HEARING OFFICER LANGE: I don't have anything else

1 at this point. Mr. Smith.

2 FURTHER EXAMINATION

3 BY MR. SMITH:

4 Q. Just a couple of follow-up questions, Dr. Logan,
5 and thank you for your patience. Correct me if I'm wrong,
6 but if I understand in summary form your position on the ICL
7 calibration laboratories document, you are relying on the ICL
8 Laboratory document plus the NIST document that you referred
9 to -- I believe it's Exhibit 5 -- in supporting your opinion
10 that the digital reference thermometers in Washington are
11 properly traceable to NIST standards. Is that a correct
12 summary?

13 A. Yes.

14 Q. And part of that is your basis the fact that ICL
15 Laboratories follows NIST technical note 1297 and various
16 other standards that they apply. Would that be fair to say?

17 A. Yes.

18 Q. If you were to learn that in fact ICL Laboratories
19 is not complying with the mandatory procedure dictated by a
20 NIST technical note or other document, would that affect your
21 opinion?

22 A. If it was a substantive deviation, yes, it would.

23 Q. Would that include something that NIST would say is
24 required, that shall be done as opposed to a recommended
25 procedure?

1 A. Yes.

2 Q. Thank you. I have no further questions.

3 HEARING OFFICER LANGE: Mr. Bianchi, anything
4 further?

5 MR. BIANCHI: No.

6 HEARING OFFICER LANGE: Ms. DanPullo?

7 MS. DANPULLO: No.

8 HEARING OFFICER LANGE: Then we are adjourned.

9 (Discussion off the record.)

10 HEARING OFFICER LANGE: We are back on the record.

11 Dr. Logan would like some clarifications regarding the e-mail
12 that he is going to search his storage data base, I guess, in
13 terms of the earlier issues raised by Mr. Smith, so can we
14 get some specification here?

15 MR. SMITH: Dr. Logan, I believe in the morning
16 testimony in relationship to Exhibits 1, 2, 3, and 4 -- I'm
17 sorry -- 1, 2, 3, your declarations, you indicated that in
18 fact there was e-mails that you had saved or that you thought
19 you had saved dealing with the creation of those three
20 exhibits or discussing the contents of those exhibits. Am I
21 correct in that?

22 THE WITNESS: Yes.

23 MR. SMITH: I asked if you'd be willing to produce
24 that, and you said yes.

25 THE WITNESS: Yes.

1 HEARING OFFICER LANGE: Do you need more detail?

2 MR. SMITH: Let me try to summarize. What I'm
3 looking for is e-mails, any e-mails that touch on the
4 creation, the modification, the drafting, or even commenting
5 on the substance of the language in Exhibits 1, 2, and 3 that
6 you signed basically this summer.

7 THE WITNESS: Okay. That's clear.

8 MS. DANPULLO: Your Honor, I'd just ask the caveat
9 be unless it's privileged communication between him and his
10 counsel.

11 HEARING OFFICER LANGE: That's why it's going to be
12 first.

13 MR. SMITH: I would ask that it still be produced
14 to the hearing officer and she make a ruling whether it's
15 privileged or not.

16 HEARING OFFICER LANGE: Absolutely.

17 MR. SMITH: The fact that she's one of many does
18 not make it privileged.

19 MS. DANPULLO: I understand.

20 HEARING OFFICER LANGE: I agree. Anything else?

21 MS. GREGG: Can I ask a question? I was not
22 obviously there for the preliminary part. I'm wondering what
23 the status of all the cases is now. Once we get a
24 transcript, are the attorneys being allowed a certain number
25 of days to submit their arguments?

1 HEARING OFFICER LANGE: We didn't deal with that
2 issue. I informed the attorneys in terms of my cases that I
3 would allow them to supplement the record with written
4 argument until the 1st of October. I'm not holding other
5 hearing officers to that requirement, and if they want to do
6 something differently, they should take this up.

7 MR. SMITH: I would just have a suggestion to that.
8 I would ask that it be ten days after we receive the
9 transcript and the e-mails, because that way if they don't
10 come until the 25th and we need more time, we don't need to
11 come back. Would that be appropriate?

12 MS. GREGG: We're not going to know what day the
13 counsel gets the transcript.

14 MR. SMITH: They're going to be distributed by who?

15 HEARING OFFICER LANGE: The court reporter. The
16 court reporter.

17 MR. SMITH: I assume we'll get ours the same time
18 the Department of Licensing gets theirs.

19 MS. GREGG: I was informed by the court reporting
20 company that we could get the transcript approximately five
21 days after the hearing.

22 MR. SMITH: I don't think that was the information
23 we had this morning.

24 HEARING OFFICER LANGE: I don't think the leaders
25 of the company had the same anticipation what was going to be

1 happening today is what actually happened here.

2 MS. GREGG: Can we ask the court reporter how long
3 she expects it will take her to get the transcript?

4 HEARING OFFICER LANGE: She told me earlier ten
5 days at the earliest.

6 THE REPORTER: Yes.

7 HEARING OFFICER LANGE: I'm not going to go
8 business days on this. I'm going to go calendar days too.

9 MS. GREGG: I didn't hear her response.

10 HEARING OFFICER LANGE: She says ten calendar days.

11 MS. GREGG: So today is the 9th, so expect it about
12 the 19th?

13 HEARING OFFICER LANGE: Which is a Sunday, so
14 probably the 20th at the earliest.

15 MS. GREGG: So in terms of the two cases of mine
16 that are on today -- Ms. Kirby and Mr. Vargas I believe are
17 -- I would ask the same thing, that any argument no later
18 than October 15 at 5 p.m.

19 HEARING OFFICER LANGE: We kind of modified that.
20 We said ten days after receipt, and if we do get it by the
21 20th, then, yes, that should be fine, the 1st of October.
22 Did you say written, Ms. Graham?

23 MS. GREGG: Written. I haven't blocked off any
24 time for additional argument.

25 HEARING OFFICER LANGE: Anybody else?

1 MS. GREGG: Can we clarify? If you have said
2 you're going to allow on your cases written argument, what is
3 Ms. Graham saying?

4 HEARING OFFICER LANGE: Ms. Graham said she's going
5 to allow written argument as well. She's not setting out
6 additional hearing time to argue it. I don't know what
7 anybody else is doing.

8 MS. KOEHLER: This is Kathy Koehler. I have one
9 case with Mr. Smith, and I believe we already covered this on
10 the record. I'll be allowing to submit written argument for
11 the same time frame, so ten days after the receipt of the
12 transcript or October 1, 5 p.m., whichever is later.

13 MR. SMITH: Thank you very much.

14 HEARING OFFICER LANGE: Anybody else? We are
15 adjourned.

16 (Deposition adjourned at 3:20 p.m.)
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REPORTER'S CERTIFICATE

I, MARY L. GREEN, the undersigned Certified Court Reporter and Notary Public, do hereby certify:

That the sworn testimony and/or proceedings, a transcript of which is attached, was given before me at the time and place stated therein; that any and/or all witness(es) were by me duly sworn to testify to the truth; that the sworn testimony and/or proceedings were by me stenographically recorded and transcribed under my supervision, to the best of my ability; that the foregoing transcript contains a full, true, and accurate record of all the sworn testimony and/or proceedings given and occurring at the time and place stated in the transcript; that I am in no way related to any party to the matter, nor to any counsel, nor do I have any financial interest in the event of the cause.

WITNESS MY HAND AND SEAL this 16th day of September 2004.

MARY L. GREEN
Certified Court Reporter
CCR No. 2981
Notary Public in and for the
State of Washington, residing
in Snohomish County.
Commission expires 4/4/2005.